NYPL RESEARCH LIBRARIES
3 3433 08177400 6

United States

IC

Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

http://www.archive.org/details/unitedstatesvene00unit

United States and Venezuelan Claims Commission.

1889–1890.

OPINIONS

DELIVERED BY THE COMMISSIONERS

IN THE PRINCIPAL CASES.

TO WHICH IS PREFIXED A COPY OF THE CONVENTIONS BETWEEN THE TWO GOVERNMENTS AND OF THE RULES OF THE COMMISSION.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1890.

Checked
May 1911

- 3793 -

BENJAMIN HARRISON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all those who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the integrity and ability of JOHN LITTLE, of Ohio, I do appoint him to be a Commissioner on the part of the United States for the adjustment of claims of citizens of the United States upon Venezuela, pursuant to the Convention between the United States of America and the United States of Venezuela of the 5th of December, 1885, and do authorize and empower him to execute and fulfil the duties of that Office according to law, and to have and to hold the said Office, with all the powers, privileges, and emoluments thereunto of right appertaining unto him, the said JOHN LITTLE, until the end of the next session of the Senate of the United States, and no longer, subject to the conditions prescribed by law.

In testimony whereof I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

[SEAL.] Given under my hand, at the city of Washington, the second day of September, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth.

BENJ. HARRISON.

By the President:

ALVEY A. ADEE,

Acting Secretary of State.

DOCTOR JUAN P. ROJAS PAUL,

CONSTITUTIONAL PRESIDENT OF THE UNITED STATES OF VENEZUELA,

To all those who shall see these presents, Greeting:

Whereas, by virtue of the Conventions concluded between the United States of Venezuela and the United States of America on the 5th of December, 1885, the 15th of March, 1888, and the 5th of October, of the same year, approved by the National Legislature and exchanged on the 3d of June ultimo, a Mixed Commission is to be convened at Washington, with the object of reconsidering the decisions of that which sat at Caracas in 1867 and 1868 under the Convention of April 25, 1866, and for the adjudication of all claims of corporations, companies, or individuals, citizens of the United States, presented to their Government or to its Legation at Caracas before the 1st day of August, 1868:

Wherefore, in order to carry into effect the aforesaid stipulations, and all the others contained in the said Conventions, reposing full confidence in the ability, learning, and patriotism of Citizen JOSÉ ANDRADE, I have appointed him, with the affirmative vote of the Federal Council, to act as the Commissioner on the part of Venezuela in the aforesaid Mixed Commission, investing him with all the necessary powers to duly and fully carry out the Conventions referred to herein.

In testimony whereof, I give these presents, under my hand, with the Great National Seal affixed hereunto, and countersigned by the Minister of Foreign Relations, at Caracas, the eighth day of August, 1889, the 26th year of the Law and 31st of the Federation.

[SEAL.]

J. P. ROJAS PAUL.

The Minister of Foreign Relations:

A. PAREJO.

COMMISSION OF JOHN V. L. FINDLAY.

OFFICE OF THE COMMISSION,
WASHINGTON, *October* 10, 1889.

BE IT KNOWN that the undersigned, Commissioners, appointed, respectively, by the President of the United States of America and the Government of the United States of Venezuela, in pursuance of the Convention between said countries for a reopening of the claims of citizens of the United States against Venezuela under the Treaty of April 25, 1866, concluded at Washington December 5, 1885, have this day chosen JOHN V. L. FINDLAY, of Baltimore, Md., U. S. A., as *Third Commissioner*, under and in compliance with Article two of said Convention, to fill the vacancy caused by the resignation of Samuel F. Phillips.*

JOHN LITTLE,
Commissioner on the part of the United States of America.

JOSÉ ANDRADE,
Commissioner on the part of the United States of Venezuela.

---

* Hon. Samuel F. Phillips was chosen as Third Commissioner September 3, 1889, and his resignation, presented October 2, was accepted October 3, 1889.

LIST OF CLAIMS REPORTED IN THIS VOLUME.

	No. of Claim.
Abbiatti, Albino	34
Aspinwall, W. H., executor of G. G. Howland, *et al.*	18
Barnes, James, Heirs of	46
Beales, Nobles and Garrison	38
Bettiker, Paul	6
Brissot, Amelia de	27
Cadiz, José F. Garcia	47
Castel, José	26
Clark, Margaret Watson de	19
Cortés, John	42
Corwin, Amos B.	39
Cox, Walter S., admr. of John P. Adams, *et al.*	53
Donnell, John, Executors of	3
Driggs, Seth	7, 10, 11, 13, 14, 15, 31, 32, 40
Driggs, Seth, representing the heirs of Benjamin Goodrich	35
Driggs, Seth, representing the owners of the brig *Good Return*	41
Driggs, Seth, representing the widow and heirs of Captain John Clark	43
Finn, Lorenzo H.	24
Flanagan, Bradley, Clark & Company	20
Forrest, Beale, and Dulaney	5
Gibbs, Robert W.	17
Gowen and Copeland	16
Hammer, Narcisa de	30
Hollins and McBlair	4
Idler, Jacob	2
Jove, Lorenzo	37
Ketchum, Morris	48
Loehr, Charles H.	44
Matchett, William B.	63
Miller, Francis S.	62
Miller, William S.	23
Morril[l], Jonathan T. [C.]	9
O'Dwyer, Richard	33
Peck, Leonardo	45
Peck, Leonardo M.	50
Rawdon, Ralph	28
Scott, Elizabeth B.	12
Stackpole, Joseph	29

No. of Claim.

Taylor, Oliver 8
Walter, Amanda G., executrix of Thos. U. Walter 52
Willet, W. E., Estate of 21
Williams, John H 36
Wipperman, Frederick 22
Woodruff, Henry 25

Note.—For the disposition made of the claims of the Union Insurance Company of Philadelphia (No. 1), W. P. Murray (No. 49), Mary E. Spader *et al.* (No. 51), Clara K. Ingersoll (No. 54), Joseph Daniels (No. 55), William H. Haney (No. 56), Edward F. Browning (No. 57), Gustave A. Bréaux (No. 58), Thomas E. Waggaman, administrator of J. H. Causten (No. 59), Henry S. Sanford (No. 60), and Nathaniel Jarvis (No. 61), see the Docket of the Commission and the printed report of the Secretary.

Office of the United States and Venezuelan Claims Commission,

1317 F street (The Sun Building).

Washington, D. C., *ss:*

Extract of the minute of the session held by the Commission on Tuesday, August 19, 1890:

"*Ordered:* That the printed Opinions in the several cases be and the same are hereby made a part of the Record of the Commission without being entered at length upon its minutes; and that the Secretary cause twenty-five copies thereof, duly certified, including the Rules adopted by the Commission, and the Treaties, to be bound and deposited in the Department of State, Washington, D. C., for the use of the two Governments."

In pursuance of the foregoing order, I hereby certify that this book contains an exact copy, in English, of the Rules of the Commission, of the Opinions rendered by the Commissioners, and of the Treaties between the United States and Venezuela referred therein.

In witness whereof, I have hereunto set my hand and affixed the seal of the Commission, at the said city of Washington, this 2nd day of September, of 1890.

Fran.co de P. Suarez

Secretary.

United States and Venezuelan Claims Commission.

Members of the Commission.

Hon. JOHN LITTLE, U. S. Commissioner, *Chairman.*

" J. ANDRADE, Venezuelan Commissioner.

" JOHN V. L. FINDLAY, Third Commissioner.*

Hon. J. HUBLEY ASHTON, Counsel for the United States.

" SAMUEL F. PHILLIPS, Counsel for Venezuela.

FRANCISCO de P. SUAREZ, Secretary.

* Appointed Oct. 10, 1889, subsequently to the resignation of Hon. Samuel F. Phillips, who acted in the said capacity from Sept. 3 to Oct. 3, 1889, and afterwards (Oct. 18, 1889) was appointed Counsel for Venezuela.

Rules of the Commission for the Settlement of Claims under the Convention of December 5, 1885, between the United States of America and the United States of Venezuela.

I.

The claims shall be entered in a docket, provided for the purpose, in the order of their presentation recognized in Article II of the Convention, and shall be numbered consecutively beginning with the claim first presented, as No. 1. The style in each case shall be:

....., claimant,
No....., against
The United States of Venezuela.

II.

There shall be filed in each case (if not already done), on or before the first Monday in October, 1889, a petition setting forth in plan and concise terms, and without repetition, the facts constituting the grounds of the claim and relied on as entitling the claimant to relief under the Convention; but the Commission, for cause shown, may extend the time for the filing of such petition.

III.

If the claim be on account of alleged loss or damage as to a number of articles, kinds, or items of property, the amount of loss or damage on account of each, exclusive of interest, must be stated; and in all cases claims for interest must be separately specified, with the rate demanded and time cov-

ered. If the claim, or any part thereof, is alleged to have arisen from acts upon the high seas, the names of the vessels concerned, the part taken by each, with the names of the commanding officers, and in the service of what governments respectively engaged, with proper dates and localities, must be stated.

IV.

If any transfer of a claim, or any part thereof, has occurred, the petition must state how, when, by what means, for what consideration, and to and by whom the same has been made.

V.

The petition must also state whether any claimant, directly or indirectly, or any other person heretofore entitled or claiming to be entitled to the claim, or any part thereof, ever received any, and if so what sum of money for or on account of such claim or part thereof, and when and from whom the same was received, and whether the claim, or any part thereof, was ever presented to any tribunal other than to the former Mixed Commission, and if so what disposition was made thereof by such tribunal.

VI.

Where the claim is for property taken, lost, or injured, for which any voucher, receipt, memorandum, or other writing was given, a copy thereof must be attached to the petition, or reason assigned for not doing so ; if not attached, the names of the parties to it and its substance must be given.

VII.

The petition must conclude with a distinct statement of the amount due the claimant for each item of loss or damage and the interest claimed thereon, the aggregate amount

claimed, the sum paid thereon if any, and the balance for which judgment as asked.

VIII.

The petition shall be verified by the oath or affirmation of the claimant, or by one of the several claimants, or if a corporation or joint stock company, by a principal officer thereof, before some officer authorized by the laws of the place to administer oaths; or, in case of the absence from the United States of such claimant or officer, the same may be verified by a duly authorized agent or attorney.

IX.

A petition may be amended at any time before final hearing upon leave granted by the Commission.

X.

It shall not be necessary for the United States of Venezuela in any case to deny the allegations of the petition or the validity of any claim. But a general denial thereof shall be entered of record by the secretary, as of course, and thereby all the material allegations of the petition shall be considered as put in issue, and the claimant shall be required to establish them by legal and sufficient evidence. An answer to a petition may be filed, in which case such order will be made respecting further pleadings in the case as may be deemed proper. A demurrer general or special may be interposed to any petition or answer.

XI.

No evidence or information in the nature thereof will be received, except such as shall be furnished by or through the respective governments.

XII.

Additional testimony may be taken in the form of deposition. The party desiring to take it shall give ten days' notice thereof, stating particularly the place and time of taking the same, the names and residences of the witnesses intended to be examined, and the subject of the examination. The adverse party may appear and cross-examine. After the deposition has been completed pursuant to such notice the adverse party may take the testimony of other witnesses in that vicinity, giving twenty-four hours' notice thereof to the opposing party, his attorney or agent, with a list of the witnesses proposed to be examined. And the same officer shall take the testimony of such witnesses as in continuation of such deposition. Each witness shall state whether he is concerned in the claim in controversy, and if so how, and whether he is related in business or otherwise to the claimant.

Any officer authorized to administer oaths by the law of the place may take such deposition. He shall first swear (or affirm) the witness to tell the truth, the whole truth, and nothing but the truth relative to the cause in which he is about to testify. He shall then write the questions desired, following each with the answer of the witness thereto, giving in every instance the exact words of the latter. If the attorney or agent of either party make any suggestion to the witness under examination as to his answer, the officer shall note the suggestion in the deposition. As soon as completed the witness shall subscribe his deposition and write his name on the margin of each sheet containing any part of it.

The officer shall give the style of the case in the caption of the deposition, and note the time and place of taking the same, together with the names of the attorneys or agents appearing for the several parties. At the conclusion of the deposition he shall certify over his official signature and seal (if he have one) that the witnesses were duly sworn (or affirmed) as required in this rule before being examined; that

he wrote the questions and the answers which they severally gave thereto; saw them sign the deposition, and that it was taken at the time and place specified in the caption. When the deposition shall have been completed and authenticated as aforesaid, he shall forthwith inclose the same in an envelope or packet, on which, after being duly sealed, he shall indorse the title of the case and the names of the witnesses examined, and, having addressed the same to the Commission at Washington, D. C., deposit it in the proper post-office duly stamped. When received by the Commission it may be opened by the secretary at the request of either party.

XIII.

The Commission may at any time specially authorize testimony to be taken upon written interrogatories or otherwise, and may also, on motion or of its own accord, order any claimant or witness to appear personally before it for examination or cross-examination. Leading questions must not be put to a witness by the party calling him, and the officer who takes a deposition, while noting any objection of counsel to any question or answer, shall not pass upon the same, but shall record the question or answer as if unobjected to.

XIV.

On motion, any testimony or matter that is improper, irrelevant, immaterial, or scandalous shall be stricken from the record.

XV.

The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the Commission with reference to the Convention under which it is created, the laws of the two nations, the public law, and these rules.

XVI.

When an original paper on file in the archives of either government cannot conveniently be withdrawn a duly certified copy may be received in evidence in lieu thereof.

XVII.

The docket will be called on the first Monday of October, 1889, and the cases taken up for consideration in their order. If a case be not ready for hearing when called, it will be passed to the heel of the docket, unless, for cause shown, other disposition be made thereof. Like calls and disposition of cases will be made at stated times.

The order and mode of procedure which obtain in courts of justice of both countries will be observed in proceedings before the Commission so far as practicable and consistent with the Convention and these rules.

XVIII.

The secretary shall keep a record of the proceedings of the Commission in a book provided for the purpose for each day of its session, which shall be read at its next meeting, and, if no objection be made, or when corrected if correction be needed, it shall be approved and subscribed by the chairman of the Commission and countersubscribed by the secretary.

He shall keep a notice book, in which entries may be made by the counsel for either government, and when made shall be notice to the opposing counsel and all concerned.

He shall provide a book of printed forms, under the direction of the Commission, in which shall be recorded its several awards or decisions signed by the commissioners concurring therein.

He shall be the custodian of the papers, documents, and books of the Commission, under its direction, and shall keep the same safe and in methodical order.

Upon each paper received by the Commission he shall indorse the date of receipt and enter a minute thereof in the docket in the proper case, and he shall make brief memoranda in such docket under the proper case of all orders of the Commission, with appropriate dates respecting such case. While affording every reasonable opportunity and facility to parties and their counsel to inspect and make extracts from papers and records, he shall permit none to be withdrawn from the files of the Commission or taken from its office, except by its direction duly entered of record.

XIX.

The docket, minutes of proceedings, and record of awards or decisions shall be kept in duplicate, both in English and Spanish, one of which shall be delivered to each government at the close of the Commission.

CONVENTION

BETWEEN

THE UNITED STATES OF AMERICA AND THE UNITED STATES OF VENEZUELA

FOR

A REOPENING OF THE CLAIMS OF CITIZENS OF THE UNITED STATES AGAINST VENEZUELA UNDER THE TREATY OF APRIL 25, 1866.*

Concluded at Washington, December 5, 1885.
Ratification, with amendments, advised by the Senate, April 15, 1886.
Ratified by the President of the United States of America, August 7, 1888.
Ratified by the President of the United States of Venezuela, August 2, 1888.
Ratifications exchanged at Washington, June 3, 1889.
Proclaimed June 4, 1889.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, a Convention between the United States of America and the United States of Venezuela for a reopening of the claims of citizens of the United States of America against the Government of Venezuela under the treaty of April 25, 1866, was concluded and signed by the respective Plenipotentiaries of the aforesaid High Contracting Parties at the City of Washington, on the fifth day of December, one thousand eight hundred and eighty-five, the original of which Convention, as amended by the Senate of the United

* For the Convention of April 25, 1866. *See* Appendix.

States of America, and being in the English and Spanish languages, is word for word, as follows:

CONVENTION FOR A REOPENING OF THE CLAIMS OF CITIZENS OF THE UNITED STATES AGAINST VENEZUELA UNDER THE TREATY OF APRIL 25, 1866.

The President of the United States of America, having on the 3d day of March, 1883, approved the following Joint Resolution of Congress: (Public Resolution No. 26.)

"Joint Resolution providing for a new Mixed Commission in accordance with the treaty of April twenty-fifth, eighteen hundred and sixty-six, with the United States of Venezuela.

"Whereas, since the dissolution of the Mixed Commission appointed under the treaty of April twenty-fifth, eighteen hundred and sixty-six, with the United States of Venezuela, serious charges, impeaching the validity and integrity of its proceedings, have been made by the Government of the United States of Venezuela, and also charges of a like character by divers citizens of the United States of America, who presented claims for adjudication before that tribunal; and

"Whereas, the evidence to be found in the record of the proceedings of said Commission, and in the testimony taken before Committees of the House of Representatives in the matter, tends to show that such charges are not without foundation; and

"Whereas, it is desirable that the matter be finally disposed of in a manner that shall satisfy any just complaints against the validity and integrity of the first Commission, and provide a tribunal under said treaty constructed and conducted so as not to give cause for just suspicion; and

"Whereas, all evidence before said late Commission was presented in writing and is now in the archives of the State Department; and

"Whereas, the President of the United States has, in a recent communication to Congress, solicited its advisory action in this matter:

"Therefore—

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he hereby is, requested to open diplomatic correspondence with the Government of the United States of Venezuela, with a view to the revival of the general stipulations of the treaty of April 25, 1866, with said government, and the appointment thereunder of a new Commission, to sit in the city of Washington, which Commission shall be authorized to consider all the evidence presented before the former Commission in respect to claims brought before it, together with such other and further evidence as the claimants may offer; and from the awards that may be made to claimants, any moneys heretofore

paid by the Department of State, upon certificates issued to them, respectively, upon awards made by the former Commission, shall be deducted, and such certificates deemed cancelled; and the moneys now in the Department of State received from the Government of Venezuela on account of said awards, and all moneys that may hereafter be paid under said treaty, shall be distributed pro rata in payment of such awards as may be made by the Commission to be appointed in accordance with this resolution."

And the proposal contemplated and authorized by the foregoing joint resolution of Congress having been made by the Government of the United States of America to the Government of the United States of Venezuela, and accepted by the latter through its diplomatic representative in Washington; the Government of the United States of America and the Government of the United States of Venezuela, to the end of effecting by means of a convention arrangements for the execution of the record thus reached between the two Governments, have named their Plenipotentiaries to confer and agree thereupon, as follows:

The President of the United States of America, Thomas F. Bayard, Secretary of State of the United States of America; and

The President of the United States of Venezuela, Antonio M. Soteldo, Chargé d'Affaires of Venezuela at Washington;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

Article 1.

The general stipulations of the Convention of April 25, 1866, between the contracting parties are hereby revived with such alterations as are required in conformity with the aforesaid joint resolution of the Congress of the United States, and with such further modifications as are deemed necessary for the certain and speedy accomplishment of the ends in view, and for the reciprocal protection of the interests of the high contracting parties as hereinafter provided.

Article II.

All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their Government or to its legation at Carácas, before the first day of August, 1868, and which by the terms of the aforesaid convention of April 25th, 1866, were proper to be presented to the Mixed Commission organized under said convention, shall be submitted to a new Commission, consisting of three Commissioners one of whom shall be appointed by the President of the United States of America, one by the Government of the United States of Venezuela, and the third shall be chosen by these two Commissioners; if they cannot agree within ten days from the time of their first meeting as hereinafter provided, then the diplomatic representative of either Russia or Switzerland at this capital shall be requested by the Secretary of State and the Venezuelan Minister at Washington to name the third Commissioner.

In case of the death, resignation, or incapacity of any of the Commissioners, or in the event of any of them omitting or ceasing to act, the vacancy shall be filled within three months by naming another Commissioner in like manner as herein provided for the original appointment.

Article III.

The Commissioners so appointed shall meet in the city of Washington at the earliest convenient time within three months from the exchange of the ratifications of this Convention, and shall, as their first act in so meeting, make and subscribe a solemn declaration that they will carefully examine and impartially decide, according to justice and in compliance with the provisions of this Convention, all claims submitted to them in conformity herewith, and such declaration shall be entered on the record of their proceedings.

Article IV

The concurring judgment of any two Commissioners shall be adequate for every intermediate decision arising in the execution of their duty, and for every final decision or award.

Article V.

So soon as the Commission shall have organized, notice shall be given to the respective Governments of the date of organization and of readiness to proceed to the transaction of the business of the Commission.

The Commissioners shall thereupon proceed without delay to hear and examine all the claims which by the terms of the aforesaid Convention of April 25, 1866, were proper to be presented to the Mixed Commission organized under the Convention of April 25, 1866; and they shall to that end consider all the evidence admissible under the aforesaid Convention of April 25, 1866, in respect to claims adjudicable thereunder, together with such other and further evidence as the claimants may offer through their respective Governments, and such further evidence as may be offered to rebut any such new evidence offered on the part of the claimant, and they shall, if required, hear one person on behalf of each Government on every separate claim.

All the papers and evidence before the said former Commission, now on file in the archives of the Department of State at Washington, shall be laid before the Commission; and each Government shall furnish, at the request of the Commissioners, or of any two of them, all such papers and documents in its possession as may be deemed important to the just determination of any claim.

Article VI.

The Commissioners shall make such decision as they shall deem, in reference to such claims, conformable to justice.

The concurring decisions of the three Commissioners, or

of any two of them, shall be conclusive and final. Said decisions shall in every case be given upon each individual claim, in writing, stating in the event of a pecuniary award being made, the amount or equivalent value of the same, expressed in gold coin of the United States of America; and in the event of interest being allowed for any cause and embraced in such award, the rate thereof and the period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission; and said decision shall be signed by the Commissioners concurring therein.

In all cases where the Commissioners award an indemnity as aforesaid, they shall issue one certificate of the sum to be paid to each claimant, respectively, by virtue of their decisions, inclusive of interest when allowed, and after having deducted from the sum so found due to any claimant or claimants any moneys heretofore paid by the Department of State at Washington upon certificates issued to such claimants, respectively, upon awards made by the former Mixed Commission under the Convention of April 25, 1866. And all certificates of awards issued by the said former Mixed Commission shall be deemed cancelled from the date of the decision of the present Commission in the case in which they were issued.

The aggregate amount of all sums awarded by the present Commission, and of all sums accruing therefrom, shall be paid to the United States. Payment of said aggregate amount shall be made in equal annual payments to be completed within ten years from the date of the termination of the labors of the present Commission. Semiannual interest shall be paid on the aggregate amount awarded, at the rate of five per cent. per annum from the date of the termination of the labors of the Commission.

Article VII.

The moneys now in the Department of State actually received from the Government of Venezuela on account of the

awards of the said former Mixed Commission under the Convention of April 25, 1866, and all moneys that may hereafter be paid on said former account by the Government of Venezuela to the Government of the United States shall be credited to the Government of Venezuela in computing the aggregate total which may be found due to the Government of the United States under the stipulations of the preceding article, and the balance only shall be considered as due and payable with interest in ten annual payments as aforesaid: *Provided, however*, That in the event of the aggregate amount which the present Commission may find due to the Government of the United States being less than the aggregate of the sums actually received from the Government of Venezuela, and remaining undistributed in the Department of State at Washington, the Government of the United States will refund such excess to the Government of Venezuela within six months from the conclusion of the labors of the Commission.

The payment of moneys due from the Government of Venezuela to the Government of the United States under the former Convention of April 25, 1866, shall be deemed to have ceased from the first day of April, 1883, to be resumed should occasion arise as hereinbefore provided.

Article VIII.

In the event of the annulment of any awards made by the former Mixed Commission under the Convention of April 25, 1866, the Government of the United States is not to be regarded as responsible to that of Venezuela for any sums which may have been paid by the latter Government on account of said awards, so far as said sums may have been distributed. In like manner, if the awards made by the present Commission and the certificates issued by it shall in any cases be found less than the amount heretofore paid to the claimants from the moneys received from Venezuela, the Government of the

United States shall not be regarded as responsible by reason thereof to the Government of Venezuela.

The rehearing provided in the present convention affects, as against the Government of the United States, only the instalments of moneys paid to and now held by the United States, and those hereafter to be paid; and the effect of such annulment or reduction in any case shall be to discharge the Government of Venezuela, wholly and forever, from any obligation to pay further instalments in such case, except as provided in the present convention.

Article IX.

It is further agreed that if the Commission hereunder organized shall, in whole or part, annul any money awards made in any cases by the former Mixed Commission under the Convention of April 25, 1866, it shall be the duty of the Commission to examine and decide whether, under all the circumstances, and with due regard to principles of justice and equity, there are any third parties who have, with the observance of due care and diligence, become possessed, prior to the date of the exchange of ratifications hereof, for a just and valuable consideration, of any portion of the certificates of award heretofore issued in said claims, and whether, under the constitution or laws of either of the contracting parties, said third parties have acquired vested rights, by virtue of the awards of the former Commission under the convention of 1866, imposing the duty on the Government of the United States to collect from Venezuela the amount or proportion of said certificates of awards which may be held and owned by third parties.

If the present Commission shall decide that there are third parties who are possessed of vested rights, then it shall examine and ascertain the sum paid by each and all of said third parties for their respective interests or shares in said awards, and shall fix the amount of their said interest in said certificates of award, or each of them, and shall issue

new certificates of award for the sums so adjudged due, which shall be paid by Venezuela to the United States in the manner hereinbefore stipulated, the same as all other certificates issued by the present Commission.

Article X.

Upon the conclusion of the labors of the Commission organized in virtue of this present convention, the Department of State of the United States of America shall distribute pro rata among the holders of the certificates which may be issued under the present convention, the moneys in the Department of State actually received from the Government of Venezuela on account of the awards of the former Mixed Commission under the Convention of April 25, 1866; and all moneys that may hereafter be paid to the United States under this present convention shall be in like manner distributed pro rata in payment of such awards as may be made under this present convention.

Article XI.

The decisions of the Commission organized under this present convention shall be final and conclusive as to all claims presented or proper to be presented to the former Mixed Commission.

Article XII.

The Commission appointed under this present convention shall terminate its labors within twelve months from the date of its organization. A record of the proceedings of the Commission shall be kept, and the Commissioners may appoint a Secretary.

Article XIII.

Notwithstanding that the present Commission is organized in consequence of representations made by the Government

of Venezuela and that it deals solely with the claims of citizens of the United States (for which reasons the United States might properly claim that all the expenses hereunder should be borne by Venezuela alone), it is agreed that, in continuation of the arrangement made in the former convention of 1866, the expenses shall be shared as follows: Each Government shall pay its own Commissioner and shall pay one-half of what may be due to the third Commissioner and the Secretary, and one-half of the incidental expenses of the Commission.

Article XIV.

Except so far as revived, continued, modified, and replaced by the terms and effects of this present convention, the effects of the former Convention of April 25, 1866, shall absolutely cease and determine from and after the date of the exchange of ratifications of this present convention, and the high contracting parties hereby agree that the responsibilities and obligations arising under said former convention shall be deemed wholly discharged and annulled by the substitution therefor of the responsibilities contracted and obligations created under this present convention, to which the high contracting parties mutually bind themselves to give full, perfect, and final effect, without any evasion, reservation, or delay whatever.

Article XV.

The present convention shall be ratified by the President of the United States by and with the advice and consent of the Senate of the United States of America; and by the President of the United States of Venezuela by and with the advice and consent of the Senate of the United States of Venezuela, and the ratifications shall be exchanged at Washington within twelve months from the date of this present convention, and the publications of the exchange of ratifications shall be notice to all persons interested.

In testimony whereof, the respective plenipotentiaries have hereunto affixed their signatures and seals.

Done in duplicate, in the English and Spanish languages, at the City of Washington, this 5th day of December, 1885.

T. F. BAYARD. [SEAL.]
A. M. SOTELDO. [SEAL.]

And whereas, the said Convention has been duly ratified on both parts, and the respective ratifications of the same were exchanged at the City of Washington, on the third day of June, one thousand eight hundred and eighty-nine;

Now, therefore, be it known that I, Benjamin Harrison, President of the United States of America, have caused the said convention to be made public, as amended, to the end that the same, and every article and clause thereof, may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America, the one hundred and thirteenth.

[SEAL.] BENJAMIN HARRISON.

By the President:

JAMES G. BLAINE,
Secretary of State.

CONVENTION TO REMOVE DOUBTS AS TO THE MEANING OF ARTICLE IX OF THE PRECEDING CONVENTION AND EXTENDING THE TIME FOR THE EXCHANGE OF THE RATIFICATIONS THEREOF.

Concluded at Washington March 15, 1888.
Ratification advised by the Senate June 18, 1888.
Ratified by the President of the United States of America August 7, 1888.
Ratified by the President of the United States of Venezuela August 2, 1888.
Ratifications exchanged at Washington June 3, 1889.
Proclaimed June 4, 1889.

By the President of the United States of America.

A PROCLAMATION.

Whereas, a Convention between the United States of America and the United States of Venezuela, to remove doubts as to the meaning of the Convention between the same high contracting parties, signed the fifth day of December, one thousand eight hundred and eighty-five, and to extend the time for the exchange of the ratifications thereof, was concluded and signed by their respective plenipotentiaries, at the city of Washington, on the fifteenth day of March, one thousand eight hundred and eighty-eight, the original of which convention, being in the English and Spanish languages, is word for word, as follows :

Convention between the United States and Venezuela to remove doubts as to the meaning of the Convention signed December 5, 1885.

Whereas, doubts have arisen in respect of the true inten and meaning of Article IX of the treaty between the United States of America and the United States of Venezuela signed at Washington on the fifth day of December, 1885, and, in consequence of such ambiguities, the exchange of ratifications of said treaty has not taken place within the period therein prescribed for such exchange ;

And, whereas, the high contracting parties are desirous of removing all doubts in respect of the meaning and intent of said Article, and of extending the time for the exchange of ratification of said treaty, to the end of reaching an amicable and honorable solution of the difficulties that now impair their good relations ;

The Government of the United States of America and the Government of the United States of Venezuela, have named as their Plenipotentiaries to conclude a Convention for that purpose : the President of the United States of America, Thomas F. Bayard, Secretary of State of the United States of America ; and the President of the United States of Venezuela, José Antonio Olavarria, Chargé d'Affaires of Venezuela at Washington ; who, after reciprocal communication of their full powers, found in due and good form, have agreed upon the following Articles :

Article I.

It is understood and agreed that in the event of any of the awards of the Mixed Commission under the Convention of April 25, 1866, being annulled in whole or in part by the Commission authorized and created by Article II of the treaty of December 5, 1885, no new award shall in any case be made by said Commission, to the holders of certificates

of any award or awards annulled as aforesaid, in excess of the sum which may be found to be justly due to the original claimant.

ARTICLE II.

The time fixed for the exchange of the ratifications of the aforesaid treaty between the United States and Venezuela signed at Washington on the fifth day of December, A. D. one thousand eight hundred and eighty-five, is hereby extended to a period not exceeding five months from the date of this Convention, or sooner if possible.

ARTICLE III.

The present Convention shall be ratified by the President of the United States of America by and with the advice and consent of the Senate thereof, and by the President of the United States of Venezuela, by and with the advice and consent of the Congress thereof, and the ratifications shall be exchanged at Washington as soon as possible within the time specified in Article II hereof as the period of extension of the time for the exchange of ratifications of the treaty signed at Washington on the fifth day of December,1885.

In witness whereof, the respective plenipotentiaries have signed and sealed the present Convention in duplicate.

Done at Washington this 15th day of March, A. D. 1888.

T. F. BAYARD. [SEAL.]
J. A. OLAVARRIA. [SEAL.]

And whereas, the said Convention has been duly ratified on both parts, and the respective ratifications of the same were exchanged at the City of Washington, on the third day of June, one thousand eight hundred and eighty-nine;

Now, therefore, be it known that I, Benjamin Harrison, President of the United States of America, have caused the said Convention to be made public, to the end that the same,

and every article and clause thereof, may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 4th day of June in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America, the one hundred and thirteenth.

[SEAL.] BENJ. HARRISON.

By the President:

JAMES G. BLAINE,

Secretary of State.

SUPPLEMENTARY CONVENTION FURTHER EXTENDING THE PERIOD FIXED FOR THE EXCHANGE OF RATIFICATIONS OF THE CONVENTION OF DECEMBER 5, 1885; AND EXTENDING THAT FIXED FOR THE EXPLANATORY CONVENTION OF MARCH 15, 1888.

Concluded at Washington, October 5, 1888.
Ratification advised by the Senate, December 5, 1888.
Ratified by the President of the United States of America, January 30, 1889.
Ratified by the President of the United States of Venezuela, May 11, 1889.
Ratifications exchanged at Washington, June 3, 1889.
Proclaimed June 4, 1889.

By the President of the United States of America.

A PROCLAMATION.

Whereas, a Supplementary Convention between the United States of America and the United States of Venezuela, to further extend the period fixed for the exchange of ratifications of the Convention of December 5, 1885, and to extend the period for the exchange of the ratifications of the Convention of March 15, 1888, between the same High Contracting Parties, was concluded and signed by their respective Plenipotentiaries at the City of Washington, on the fifth day of October, one thousand eight hundred and eighty-eight, the original of which Supplementary Convention, being in the English and Spanish languages, is word for word, as follows:

SUPPLEMENTARY CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND VENEZUELA, TO FURTHER EXTEND THE PERIOD FIXED FOR THE EXCHANGE OF RATIFICATIONS OF THE CONVENTION OF DECEMBER 5, 1885, AND TO EXTEND THE PERIOD FOR THE EXCHANGE OF THE RATIFICATIONS OF THE CONVENTION OF MARCH 15, 1888.

Whereas, by Articles I and II of a Convention, signed and concluded by the respective Plenipotentiaries of the United States and Venezuela, in the City of Washington, on the 15th day of March, 1888, it was provided that the time fixed by the Convention between the said parties, signed and concluded December 5, 1885, for the exchange at Washington, of the ratifications thereof, should be extended to a period not exceeding five months from the date of said convention, to wit, from the 15th day of March, 1888, or sooner, if possible, and that the ratifications of the said Convention of March 15, 1888, should in like manner be exchanged at Washington within the same period;

And whereas, the period, as aforesaid prescribed, elapsed on the 15th day of August, 1888, without such exchange having been effected;

And whereas, it appears that the Congress and Government of Venezuela did, according to the Constitutional forms of that Republic, ratify and confirm the said Conventions at Caracas on the 27th day of July, 1888, and that the President of the Republic of Venezuela did on the 2d day of August, 1888, fully empower the Representative of that Republic in the United States to exchange ratifications thereof with whoever should be duly authorized on behalf of the United States;

And whereas, the said Conventions having been theretofore duly ratified by the President of the United States, by and with the advice and consent of the Senate thereof, the Secretary of State of the United States, duly empowered by the President of the United States, was ready on and before the said 15th day of August, 1888, to effect the exchange of ratifications of the said Conventions as stipulated;

And whereas, by reason of unavoidable delay, the copy of the said Convention ratified by the Government of Venezuela as aforesaid and the necessary powers to enable the Representative of that Government in the United States to make exchange of ratifications could not be produced in the city of Washington, D. C., until after the expiration of the period so as aforesaid stipulated for the exchange of ratifications;

Now, therefore, the Governments of the United States and Venezuela, being desirous of completing and putting in force the two Conventions aforesaid at the earliest day possible, have respectively named as their Plenipotentiaries to conclude a Convention for that purpose,

The President of the United States of America, Thomas F. Bayard, Secretary of State of the United States of America,

And the President of the United States of Venezuela, Francisco Antonio de Silva, Chargé d'Affaires of the United States of Venezuela at Washington;

Who, after reciprocally satisfying each other in good and due form of their competency to negotiate to such end, have agreed upon the following Articles:

Article I.

The time fixed, by Articles I and II of the Convention between the Contracting Parties, signed at Washington, the 15th day of March, 1888, within which to effect the exchange of the ratifications of the Convention between said parties signed at Washington, on the 5th day of December, 1885, and also of the said Convention of the 15th day of March, 1888, is hereby extended to a period not exceeding ten months from the 15th day of August, one thousand eight hundred and eighty-eight, or sooner if possible.

Article II.

The present Convention shall be ratified by the President of the United States of America, by and with the advice and

consent of the Senate thereof; and by the President of the United States of Venezuela, by and with the advice and consent of the Congress thereof; and the ratifications shall be exchanged at Washington, as soon as possible within the time specified in Article I hereof as the period of extension of the time for the exchange of ratifications of the Convention signed at Washington, on the 5th day of December, 1885, and of the Convention signed at Washington on the 15th day of March, 1888.

In witness whereof, the respective Plenipotentiaries have signed and sealed the present Convention in duplicate, in the English and Spanish languages.

Done at Washington, this fifth day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

T. F. BAYARD. [SEAL.]
Fco ANTo SILVA. [SEAL.]

And whereas, the said Supplementary Convention has been duly ratified on both parts, and the ratifications of the same were exchanged at the City of Washington, on the third day of June, one thousand eight hundred and eighty-nine;

Now, therefore, be it known that I, Benjamin Harrison, President of the United States of America, have caused the said Supplementary Convention to be made public, to the end that the same, and every article and clause thereof, may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington, this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America, the one hundred and thirteenth.

[SEAL.] BENJ. HARRISON.

By the President:

JAMES G. BLAINE,
Secretary of State.

APPENDIX.

CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF VENEZUELA FOR ADJUSTMENT OF CLAIMS, CONCLUDED AT CARACAS APRIL 25, 1866; RATIFICATION ADVISED BY SENATE JULY 5, 1866; RATIFIED BY PRESIDENT AUGUST 8, 1866; RATIFICATIONS EXCHANGED AT CARACAS APRIL 17, 1867; PROCLAIMED MAY 29, 1867.

The conclusion of a convention similar to those entered into with other republics, and by which the pending American claims upon Venezuela might be referred for a decision to a Mixed Commission and an Umpire, having been proposed to the Venezuelan Government on behalf of the United States of America, as a means of examining and justly terminating such claims; and it having been thought that the adoption of the contemplated course will secure, at least, some of the advantages attending Arbitration, so strongly recommended in article the 112th of the Federal Constitution of Venezuela, while it will preserve unimpaired as reciprocally desired, the good understanding of both nations, the Citizen First Vice-President in charge of the Presidency has accepted the above proposal and authorized the Minister for Foreign Relations to negotiate and sign the proper convention. Thereupon said Minister and Mr. E. D. Culver, Minister Resident of the United States of America, also duly empowered for that purpose, have agreed upon the following articles of Convention:

Article I.

All claims on the part of corporations, companies, or individuals, citizens of the United States upon the Government

of Venezuela which may have been presented to their Government or to its legation in Caracas, shall be submitted for examination and decision to a Mixed Commission consisting of two members, one of whom shall be appointed by the Government of the United States, and the other by that of Venezuela. In case of death, absence, resignation, or incapacity of either of the Commissioners, or in the event of either of them omitting, or ceasing to act, the Government of the United States, or that of Venezuela, respectively, or the Minister of the United States in Caracas, by authority of his Government shall forthwith proceed to fill the vacancy.

The Commissioners so named, shall meet in the city of Caracas within four months from the exchange of the ratifications of this convention; and before proceeding to business, they shall make solemn oath that they will carefully examine and impartially decide according to justice, and in compliance with the provisions of this convention, all claims submitted to them; and such oath shall be entered on the record of their proceedings.

The Commissioners shall then proceed to appoint an Umpire, to decide upon any case or cases concerning which they may disagree, or upon any point of difference that may arise in the course of their proceedings. And if they cannot agree in the selection, the Umpire shall be named by the Diplomatic Representative either of Switizerland or of Russia in Washington, on the previous invitation of the high contracting parties.

Article II.

So soon as the Umpire shall have been appointed, the Commissioners shall proceed without delay to examine the claims, which may be presented to them, under this convention; and they shall, if required, hear one person in behalf of each Government on every separate claim. Each Government shall furnish, on request of either Commissioner,

all such documents and papers in its possession, as may be deemed important to the just determination of any claim.

In cases, where they agree to award an indemnity, they shall determine the amount to be paid, and issue certificates of the same. In cases, when the Commissioners cannot agree, the points of difference shall be referred to the Umpire before whom each of the Commissioners may be heard. and whose decision shall be final.

The Commissioners shall make such decision as they shall deem, in reference to such claims, conformable to justice, even though such decisions amount to an absolute denial of illegal pretensions, since the including of any such in this convention is not to be understood as working any prejudice in favor of any one, either as to principles of right or matters of fact.

Article III.

The Commissioners shall issue certificates of the sums to be paid to the claimants respectively by virtue of their decisions, or those of the Umpire ; and the aggregate amount of all sums awarded by the Commissioners, and of all sums accruing from awards made by the Umpire, shall be paid to the Government of the United States. Payment of said sums shall be made in equal annual payments, to be completed within ten years from the date of the termination of the labors of the Commission ; the first payment to be made six months from the same date. Semiannual interest shall be paid on the several sums awarded, at a rate of five per cent. per annum from the date of the termination of the labors of the Commission.

Article IV.

The Commission shall terminate its labors in twelve months from the date of its organization, except that thirty days ex-

tension may be given to issue certificates, if necessary, on the decisions of the Umpire in the case referred to in the following article: They shall keep a record of their proceedings, and may appoint a secretary.

Article V.

The decisions of this Commission and those (in case there may be any) of the Umpire, shall be final and conclusive as to all pending claims at the date of their installation. Claims which shall not be presented within the twelve months herein prescribed, will be disregarded by both Governments, and considered invalid.

In the event, that upon the termination of the labors of said Commission, there should remain pending one or more cases before the Umpire, awaiting his decision, the said Umpire is authorized to make his decision and transmit same to the Commissioners, who shall issue their certificates thereupon and communicate [them] to each Government, which shall be held binding and conclusive: *Provided, however*, That his decision shall be given within thirty days from the termination of the labors of the Commission, and after the expiration of the said thirty days, any decision made shall be void and of no effect.

Article VI.

Each Government shall pay its own Commissioner and shall pay one-half of what may [be] due the Umpire and Secretary, and one-half the incidental expenses of the Commission.

Article VII.

The present Convention shall be ratified, and the ratifications exchanged, so soon as may be practicable, in the City of Caracas.

In testimony whereof, the Plenipotentiaries have signed this Convention and hereunto affixed the seals of the Ministry of Foreign Relations of the United States of Venezuela, and of the Legation of the United States of America in Caracas, this twenty-fifth day of April, in the year one thousand eight hundred and sixty-six.

The Minister Resident of the United States of America,

E. D. CULVER. [SEAL.]

The Minister of Foreign Relations of the United States of Venezuela,

RAFAEL SEIJAS. [SEAL.]

[October 21, 1889.]

APPLICATION FOR A MODIFICATION OF THE RULES.

LITTLE, for the Commission:

1. Several suggestions have been urged, *arguendo*, upon our attention, by counsel representing various claimants, touching the jurisdiction, powers, and duties of the Commission, under the Convention, with a view to a modification of the rules heretofore promulgated, to conform to the suggestions, should the latter be concurred in.

It is urged that the present Commission was created to *review* the awards of the former one, and not to consider and pass upon claims submitted as *res novæ*, and that certain presumptions favorable to former awardees result. Other considerations, involving a construction of the treaty in some particulars, are presented.

The propositions so urged are not, in our opinion, proper subject-matter for rules of procedure. We have not, therefore, deemed it necessary to enter upon their examination with a view of reaching a conclusion as to their soundness. They may call for solution in the several cases to be heard, but not generally when no claim in particular is under consideration. The questions presented may affect substantial private interests, and the parties concerned may have the right to be heard as to them. They cannot, therefore, be settled by general rules.

Obviously, we would not be warranted in carrying into the rules anything that might operate to forestall or preclude a party from urging whatever may seem to him, according to the treaty, proper matter for consideration, when his claim or contention is under hearing. Should he then go beyond

the limits of proper inquiry, or misconceive the jurisdiction of the Commission, correction can be made, if necessary.

2. It is also urged that the Commission is bound to consider and determine every claim submitted to it under the treaty, whether represented or not, and whether any petition has been filed as to it, or not.

We do not care, in advance, to express an opinion on this point. It may be observed, however, that there is nothing to the contrary expressed in the rules. It may also be remarked that nobody is bound to do an impossible thing.

Claimants would do well to bear in mind that the time for the transaction of the business committed to the Commission is limited, and that their assistance is needed to render certain its completion within that time. We think the Commission has the authority, *ex necessitate*, to make and enforce such reasonable rules as will insure every claimant an opportunity, at least, within the designated period to have his claim heard and determined with such deliberation as a just regard for the rights of all concerned may demand.

The rules relating to petitions and their contents seem to us to be such as will operate to this end. If any claimant be unwilling to conform to them, and the Commission in consequence be so delayed in its work as that his case shall not be concluded when the Commission expires, we trust the fault may not be ours.

3. There were other matters discussed, but we fail to see in them any cause for modifying the rules.

Should change or addition be deemed desirable hereafter, the way will be open.

In this connection, and as tending to clearness of understanding in respect of some matters referred to by counsel, we announce, subject to modification, that—

Each claim referred to in Article Two of the Convention and submitted to the Commission, will be taken up under the rules, and heard and considered, primarily, at least, as an entirety or unit.

When the finding therein is against Venezuela, and several persons show, by petition or petitions, themselves to be "claimants" in respect thereto, within the meaning of the treaty, or to have "vested rights" under Article Nine thereof, the questions raised, so far as they fall within the jurisdiction of the Commission, will then be determined.

[December 14, 1889.]

W. B. MATCHETT *v.* THE UNITED STATES OF VENEZUELA.

FINDLAY, for the Commission:

This case was heard on the demurrer of Venezuela to the petition of the claimant, and was also considered in the light of the argument presented by the claimant in a written brief submitted for our consideration. The petition is very loosely drawn, and does not present the facts constituting the petitioner's claim in plain and concise terms as the rules require, and the Commission is not to be understood by the consideration it has given to this case as establishing a precedent for similar relaxation in any future case that may claim its attention. Stated in the language of his brief, his claim is "that by reason of services performed in behalf of Venezuela, the certificates he claims were, by agreement with Venezuela, to be protected." It appears that the petitioner had gotten possession of or became interested in certain of the certificates issued by the old Commission which sat in Caracas in 1868, and being employed afterwards, as he alleges, by Venezuela, for the purpose of securing a revision of the awards made by this Commission, on the ground of the alleged fraud with which they were tainted, and which, if successful, would have invalidated the certificates held by him, as well as all the other certificates issued by the Commission, the petitioner entered into a special agreement with Venezuela by which the certificates held or claimed by him were to be protected. He was to act as the agent or attorney of Venezuela in procuring such action on the part of the United States as would lead to a reopening of all the claims passed upon by the original Commission. And as one of the consequences,

indeed, according to his own showing, one of the inevitable consequences, of this review, would be the annulment of the very awards upon which the certificates held by him were founded, he consummated with Venezuela the very peculiar agreement by which she consented that these particular certificates in which the petitioner was interested should be saved, regardless of the fate of the awards, on the faith of which they were issued. The petitioner alleges that he entered upon the employment as undertaken, and that as a result of his labors a new Convention was agreed on between the United States and Venezuela, for the purpose of reopening the claims of citizens of the United States against Venezuela, under the Treaty of April 25, 1866; that he has done all that he agreed to do, and that it would be unjust on the part of Venezuela *not* to protect his certificates; and he asks this Commission to issue to him a new certificate in lieu of the old ones. To this the Counsel of Venezuela interposes the objection that the petitioner admits that this agreement and the performance of the alleged service under it were long subsequent to the 1st of August, 1868, as in the nature of the case they must have been; and that, therefore, this Commission has no jurisdiction to hear and determine the claim for this service, because, by the plain language of the Second Article of the Treaty, it does not fall within the terms of the submission.

The language of this Article is as follows:

"All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their Government or its legation at Caracas before the first day of August, 1868, and which, by the terms of the aforesaid Convention of April 25, 1866, were proper to be presented to the Mixed Commission organized under said Convention, shall be submitted to a new Commission."

It would seem too plain for argument that this Commission, which is the new one mentioned in this Article, has no authority to entertain the consideration of a claim arising after the date mentioned, for the simple reason that no such

claim could lawfully be submitted for its consideration. It is equally plain to the Commission that the special agreement alleged to have been made by the claimant is the origin of the claim he now presents, and cannot be confounded with the certificates on which he asks protection. The certificates may give him, possibly, a ground of claim under the Ninth Article of the Treaty, subject, of course, to the limitation put upon it by the First Article of the Supplementary Convention, which was adopted for the express purpose of removing doubts as to the meaning of the Ninth Article. The Commission, however, decides nothing upon this point; but will wait until the petitioner prefers such a claim in regular form, if he chooses. As he comes before us now he is an original claimant asking remuneration for services rendered by special agreement with Venezuela under an employment long subsequent to the period prescribed by the Treaty itself, after which claims of this kind cannot be submitted for consideration. For this reason the demurrer will be sustained and the petition dismissed, without prejudice, however, to the right of the petitioner to prosecute his claim against Venezuela for the alleged service rendered in any way that may be open to him.

GENERAL QUESTIONS.

[March 26, 1890.]

LITTLE, for the Commission:

We will dispose of some of the questions discussed in the general argument applicable to all the cases.

CHARACTER OF THE PROCEEDINGS UNDER THE TREATY.

These hearings have been conformed, as far as practicable, to the methods ordinarily pursued in courts of justice.

Following that course, we have deemed it fit, especially in view of the circumstances culminating in the present convention, to accompany the decisions required to be in writing with a statement of the reasons therefor. This we do the more readily, because our enunciations can be only for these sixty-odd cases, and even as to such of them as are yet to be decided, subject to modification if found incorrect.

The question is presented at the threshold whether the decisions of the old Commission on claims must be taken as having evidential value in the adjudication of the same claims by this one. Counsel for certificate holders insist they should be, at least where they resulted in the issuance of certificates of award, and that our duty is "to review" the former adjudications rather than to hear and pass upon the claims as *res novæ*.

Finding ourselves not in accord with this view, we have deemed it proper, owing to the great interests involved, touch-

ing as they do the entire submission, to discuss their elaborate argument in some detail.

They contend (Brief, p. 12) that—

"Said treaties, under which you act, do not submit for your consideration and adjudication claims to be by you adjudicated as if such claims came to you as *res novæ*, but these claims, on the contrary, under said treaties, are submitted to you as claims which have been *once adjudicated*, and where that adjudication has been so attacked, by one party to the controversy, as to have induced the high contracting parties to order a "*review*" of the former adjudication. And in such review, in the nature of a new trial, you are bound to proceed *as a reviewing court*, for the purpose of determining whether the former awards should, upon principles of law, be "surcharged" or "abrogated;" and, in determining this question, the Commission is bound to concede to the former awards and adjudication such force and legal effect, in favor of the validity of the awards, as the international law gives to final awards when a new law or treaty has brought them under review of international commissions."

The argument in support of the proposition seems to proceed, though as to its principle features not necessarily based, upon the assumption of ambiguity in the language of the treaty (the convention of 1885 and its supplements being regarded as one) defining the duties of the Commission respecting the adjudication of claims submitted to it. For, as a preliminary step, counsel invoke for the benefit of the certificate holders the aid of the principle interrogatively put by Mr. Justice Story in Shanks *v.* Dupont (3 Peters, 249), cited, to wit:

"If the treaty admits of *two constructions*—one limited, and the other liberal; one which will further, and the other exclude, private rights—why should not the most liberal exposition be adopted?"

And which is stated more broadly by Mr. Justice Swayne in Hauenstein *v.* Yulhan (100 U. S., 483), also cited, as follows:

"Where a treaty admits of *two constructions*, one restrictive as to rights that may be claimed under it, and the other liberal, the latter is to be preferred."

No particular passage susceptible of "two constructions," to which this principle may or does attach itself, and turn an otherwise doubtful meaning to the support of "private

rights," has been pointed out, or by us discerned. We are left to infer that counsel regard the treaty as a whole so far ambiguous in the respects indicated as to call for the application of the rule named. But, if the requisite ambiguity be conceded, does the occasion exist for the application of the doctrine in support of their contention? It seems to us not.

If there were no other objection, conflicting private interests stand in the way.

It so happens that, of the 49 or 50 claims disposed of by the former Commission, aggregating in amount nearly five million dollars, money awards were adjudged in only 24 of them, amounting to but a little over a million and a quarter dollars. The others were rejected or not considered. Those receiving certificates of award are thus in the minority, both in number and amount, to say nothing of claims not passed upon by it, but pending here.

To adopt a rule of construction that would aid these, and operate against the interests of the unsuccessful claimants, would not, on the whole, "further" private rights. For the rule, we think, cannot be applied to one class of claimants only. Its office is to reveal, not to vary or accommodate the meaning of an instrument.

It would require unmistakable terms, not observed in the treaty, to show that a discrimination among claimants, all citizens of the same country, was intended.

Again, an international award, disconnected with the means of ascertainment, is no more than any other expression of differences arrived at by other means with like opportunity, skill, and probity. It is what is behind it that bestows legal energy, namely: The adjudication of a competent tribunal supported by the plighted faith of the states concerned. The full force of such an award may be said to equal the credit which reasonably attaches to an adjustment of submitted differences between disputants reached through the care, candor, and intelligence exercised in that behalf, *plus* the legal effects such an adjudication imparts thereto. This

addition, the seal of the public law upon the adjustment, gives the award or sentence, while undisturbed, its quality of verity. It is the source of all inhering presumptions, and, of course, pertains to all awards alike—to the negative as well as to the positive, *i. e.*, to those rejecting as well as those allowing claims. The interested states may set them aside—may break the seal; then, in the absence of preservative provisions, the legal effects cease, leaving only the fact that such an adjustment had been made, valuable or not in itself, according to attendant circumstances.

It follows that if the old awards are to be taken in one class of cases as *prima facie* correct, or as having any legal virtue as evidence, they must also be in the other, the treaty not stipulating to the contrary. The rule would not be applied, it is apprehended, where the interests of a single individual would suffer thereby. It does not present a question of majorities.

If, then, the contention of counsel be sound, it must find its support independently of the principle so invoked in its aid. It is unnecessary to consider whether under other circumstances these controversies, being between sovereign powers, could be affected by the application of the principle.

Two principal citations from eminent authorities are relied upon by counsel as directly supporting their main proposition, one a passage from Vattel, book 2, chap. 18, sec. 329, and the other the case of the Choctaw Nation *v.* the United States (119 U. S., 1).

The former is cited as "thoroughly settled law" to show "what the *prima facie* effect of such awards [those of the old Commission] is when they, by new treaties or otherwise, are brought under 'review.'"

It reads, with counsel's emphasis, as follows:

"If, then, their sentence be confined within these precise points, the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced of a question which they themselves have rendered doubtful by the discordance of their claim, and which has been referred, as such, to the decision of the arbitrators. *Before they can pretend to evade*

such a sentence they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality."

Waiving the assumption here that the former awards are under "review"—one of the things counsel set out to show—we have to remark that whatever may be fairly deduced from this passage touching the character or effects of an arbitration sentence would seem to arise from its condition *before* disturbance or "evasion" by treaty and not after. The precept is addressed to *states* which have arbitrated their differences, and is advisory to *them*, in movements to disturb the results of arbitration. If sound, it might well have been quoted to the two governments, pending the negotiation of the present treaty; but it has no obvious application to subsequent conditions. Whatever course may be thought advisable for states to pursue in such matters, it will not be denied that they *can* by treaty evade arbitration sentences to which they are parties, for any cause, or even without (if that be conceivable), if they choose to do so. They have the power, and its exertion rests potentially in their discretion.

Of course, it does not concern us to inquire into the legitimacy of the action had about the old awards. There is an aspect, however, in which the question seems to be incidentally involved. The logic of counsel on this head appears to come to about this, namely: The commission is bound to assume the two states acted lawfully in making the treaty. The only lawful mode of "evading" the old awards was to proceed in that behalf according to the "thoroughly settled law," to wit: Vattel's rule. As that rule was confessedly not complied with, the awards are not "evaded," but continued in force, retaining their legal characteristics until ended by new adjudications. Taking their understanding of the author as correct (only for the argument) when they say (Brief, 25): "Vattel declares to be *necessary* for the overthrow of international arbitration" the establishment of fraud in connection with its awards; and assuming, as we must, entire legality of action in

the states, it follows either that the old awards are not "evaded," or that Vattel's rule is not the law *for these cases.* We are constrained to accept the latter conclusion. In the first place, as a matter of fact, the two Powers did *not* "acquiesce" in the old "sentences." They made provision to "evade" them; while they did not claim, as counsel show, the establishment, by "incontestable facts," either of corruption or flagrant partiality.

Mr. Secretary of State Bayard on one occasion used this axiomatic language:

"No matter how solemn and how authoritative may be a judgment, it is subject to be set aside by the consent of the parties. To the awards of international commissions, were the award in this case to be considered as such, this proposition applies with peculiar force, since as is elsewhere noticed in this report, it is a settled principle of international law that no sovereign can in honor press an unjust or mistaken award, even though made by a judicial international tribunal invested with the power of swearing witnesses and receiving or rejecting testimony."

Mr. Senator Edmunds, in the *North Am. Rev.* for Jan., 1879, wrote:

"A just nation, however, in whose favor an award has been made, should be willing to forego the advantage of a victory on far less evident grounds than those which would justify a refusal by the losing party to perform, and to readjust and retry the matter in dispute, *if it had reason to think* that any serious error had been committed, or that anything of corruption or unfairness had played a part in the affair, for no honorable government could consent to profit by a success so gained."

(We understand the Senator to have used the language we have emphasized in a judicial rather than popular sense.) There is great force and wisdom in what Mr. Secretary of State Evarts said in his report to the President (1880), on the Weil and La Abra cases, as to disturbance of international settlements by arbitration, namely:

"The principle of the settlement of international differences by arbitral commissions is of such deep and wide-reaching interest to civilization, and the value of such arbitration depends so essentially upon the certainty and finality of its decision, that no government should lightly weaken its influence or diminish its consideration by making its action the subject of renewed discussion."

On the other hand it may be as truly said, if arbitration is to have the growth and beneficent results predicted and hoped for by philanthropists as an agency for the settlement of international controversies and for "keeping War at a distance," it must have as a basis constant integrity, impartiality, and intelligence. Its conduct by those charged from time to time with its duties must be such as to merit and receive the approval of an enlightened and just public opinion. "International arbitration," said Chief-Justice Waite (110 U. S., 63), "must always proceed on the principles of national honor and integrity." These things are no less essential, as, we doubt not, the distinguished jurist whose report we draw from would agree, than that its results, like domestic judgments, should give promise of repose. To assure such essentials and the requisite abiding faith in them, the corrective for official departure from duty or serious miscarriage of justice should be applied with suitable certainty and dispatch, and the occasions for its use determined by reasonable and practicable ways. Whatever rule, looking to the correction of arbitral wrongs, will best subserve all these great ends—be most promotive of justice and peace among the nations—would seem to be consonant with reason and, therefore, the public law. Individual interests, always to be guarded with watchful care, are nevertheless, by common consent, secondary and subservient to the higher general weal.

If Vattel's precept make the development of alleged wrongdoing too difficult, in any case, in the opinion of those concerned—and cases may be easily conceived where its plenary application would result in defeat of justice—why should it not be relaxed? Parties may be morally sure that fraud and flagrant partiality were practiced in the procurement of a given award, and yet may be unable to show either by "incontestable facts."

Who may rightly assert that these two governments, deeming that rule too rigid and exacting to answer their high purposes, were not warranted, without its full observance, in

disturbing the awards of 1868? Or that they, following the suggestion of the American Congress, stepped aside from the true pathway of nations, in impliedly announcing that arbitration shall not only be grounded in integrity, but "conducted so as not to give cause for just suspicion?" Certainly not we.

If, therefore, the application of any rule upon the subject were in anywise involved in our duties, as counsel seem to think is the case, we could only take the author's, as interpreted by them, with the modification implied in the action of the signatories. Their law upon the subject, so far as these claims are concerned, as gathered from the convention itself, may be formulated thus:

Where serious charges impeaching the validity and integrity of proceedings under treaty for the arbitration of claims of citizens of one state upon the government of another, have been made by the debtor government and divers citizens of the creditor state, supported by evidence tending to establish their truth, a rehearing before a new commission of the claims arbitrated, or intended to be arbitrated, may be authorized by, and the awards annulled in pursuance of, a new convention entered into at the instance of the legislature of the creditor state, without such charges being established by incontestable facts or otherwise.

As to the decision of the Supreme Court of the United States:

The United States Senate under a treaty (1855) between the United States and the Choctaw Nation, one of its Indian tribes, made an award of a large sum of money to the Indians. The award was not paid, but the matter was referred to the Court of Claims, by act of Congress (1881), which provided:

"That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon. Power is hereby granted the said court to *review* the entire question of difference *de novo*, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of 1855."

The Court of Claims, on the trial of the case, held that this statute destroyed "the sanctity of the award under the treaty of 1855." The cause was appealed to the Supreme Court of the United States, which gave a different *construction* to the statute. It held:

"The language of the act of March 3, 1881, in reference to the award made by the Senate under the treaty of 1855, does not abrogate it, and does not require, as a condition to the exercise of the jurisdiction conferred by the act, that the court should entirely disregard it, giving it no effect whatever. It merely says that the court shall not be estopped by any action had or award made by the Senate in pursuance of that treaty. The plain and literal meaning of this language is fully satisfied by holding that the award, considered as such, shall not upon its face, be taken to be final and conclusive. There is nothing in the language to prevent the court from giving to that award effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation."

Counsel claim, in effect, that the awards of 1868 are placed relatively in the same legal situation before this Commission, by the treaty, that the Senate award was before the Court of Claims by said act, and that, under the doctrine of this decision, therefore, effect should be given them as evidence in the re-adjudications.

While the decisions of the highest court of either country are not binding upon the Commission as precedents, they are entitled at its hands to great respect as authority. Concurring decisions would, of course, be followed. But there are several things which distinguish the two cases.

1. The question here was as to the meaning of particular language, the like or the similarity of which does not appear in the treaty. The power granted the Court of Claims was "*to review*" "the entire question of difference *de novo*," &c. The treaty gives no authority by its terms "to review" any question or matter. The word "review," or an equivalent in term or phrase, is not found in it.

2. The United States, the debtor party to the Senate award, without consent, so far as appears, of the Indians, passed the act "to review" the question arbitrated; whereas the United States and Venezuela *agreed*, not to review, but to

have a "rehearing" (Art. 8) of the claims arbitrated. The rule of construction in the two cases, it is believed, would be different. In the former the language would be taken most strongly against the United States, and in favor of the Indians. In the latter no preference would be shown.

3. The parties were not on an equal footing in the Choctaw case. They are, here. The decision of the court seems to be rested upon this ground of inequality, and of the fiduciary character of the relation between the suitors; for by way of inducement to the conclusion reached, the Court say:

"The Choctaw Nation falls within the description, not of an independent state or sovereign nation, but of an Indian tribe."

* * * * * * *

"The Indian tribes are the wards of the nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. * * * From their weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty and with it the power of protection."

* * * * * * *

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extensive meaning than their plain import as connected with the tenor of the treaty, they should be considered only in the latter sense."

* * * * * * *

"The recognized relation between the parties to this controversy, therefore, is that between a superior and inferior whereby the latter is placed under the care and control of the former. The parties are not on an equal footing."

With these considerations as a basis, and expressly because of them, a divided court held as stated with respect to the Senate award, the Chief-Justice dissenting.

It is as plainly apparent as if expressly stated that the court did not intend to announce a rule of construction applicable to a contract freely entered into by parties occupying a common ground of equality and independence. It is true the late able jurist, Mr. Justice Matthews, who delivered the opinion, indulged in the *dictum* that the rules applied were those which govern public treaties. But what he meant by the remark follows the statement, namely:

That treaties "in case of controversies between nations equally independent are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the laws of nations."

This principle, stated with the usual indefiniteness in the concluding paragraph, requires, we apprehend, nothing different from this, to wit: That treaties, like other contracts, should be read in the light of surrounding circumstances, applying to the terms employed their ordinary meaning in like relation, with a view of ascertaining the intention of the parties. In treaty interpretation, we should say, that is not the "larger reason" which is not such for both sides. We see nothing in this case to support the proposition of counsel.

Has their contention justification in the language of the treaty? Certain phrases are pointed out to show it has. It will suffice, perhaps, to notice two or three claims under this head.

On page 24 of the brief is this conclusion:

"*Thus it is made plain that the object of the new trial was to remove the grounds of 'suspicion' and 'complaints' against the first Commission.* This necessarily involves action, investigation, construction, and adjudication in the nature of a 'review' of the action of the first Commission; for it would be impossible to 'satisfy any just complaints against the validity and integrity of the first Commission,' if the action of such first Commission were not designed to be the subject-matter of review. It was not the object of the new treaties to condemn the former Commission in such sense and way as to pronounce it guilty of fraud and abolish its work, but to create a tribunal, which, by a re-examination of the evidence on which the Caracas awards were founded, should 'satisfy any just complaints against the validity and integrity of the first Commission.'"

If this excerpt embodies "the design of the new treaty," as is argued, its importance is manifest. But here again we are constrained to differ with counsel.

It would be remarkable for the two governments to provide a new trial to exonerate the old Commissioners, when, judging from current history, neither of them asked for or desired or supposed himself to need the vindication suggested.

It would be still more remarkable to order a new trial for such purpose and withhold from the triers all suitable means of inquiring into the grounds of the "suspicion" and "complaints" to be removed, as appears to be done here. Under the treaty no evidence pertaining to these specific things can be received or considered, nor can any expression upon them be made. If it be said the vindication is to come through affirmances, the awards having their due weight in securing them, it may be answered: Different conclusions are not incompatible with integrity, as between several tribunals passing on the same things. If they were, few would be found willing to undertake the task of "review." In case of differences here, if vindication be involved, who is to say whether our judgments impeach theirs, or theirs, ours? Again, we do not hear the claims necessarily upon the same testimony heard before. Additional evidence in every instance is authorized. What vindication or condemnation, then, in any view, can result? None, we think.

Still, if the language of the treaty reveals this purpose, we are bound to accept and act upon it, however remarkable it may seem, or inadequate the means of accomplishment.

The first three clauses of the preamble to the joint resolution of Congress embodied in the prefatory part, and claimed to be "part and parcel" of the treaty, are these:

"Whereas, since the dissolution of the mixed Commission appointed under the treaty of April twenty-fifth, eighteen hundred and sixty-six, with the United States of Venezuela, serious charges, impeaching the validity and integrity of its proceedings, have been made by the government of the United States of Venezuela, and also charges of a like character by divers citizens of the United States of America, who presented claims for adjudication before that tribunal; and

Whereas, the evidence to be found in the record of the proceedings of said Commission, and in the testimony taken before committees of the House of Representatives in the matter, tends to show that such charges are not without foundation; and

Whereas, it is desirable that the matter be finally disposed of in a manner *that shall satisfy any just complaints against the validity and integrity of the first Commission*, and provide a tribunal under said treaty constructed and conducted so as not to give cause for just suspicion," &c.

The last clause, it is argued, discloses the purpose stated.

Passing the questions as to whom and how far the preamble to an instrument may be consulted in determining its meaning, and as to what extent said joint resolution forms a part of the articles of convention, we say at once the language referred to does not, in our opinion, bear the construction given it.

A "review" of the former adjudications, if such were our task, could tend to remove "the grounds of 'suspicion' and 'complaints' against the first Commission" only by affirmances of its action. Certainly, to differ could not have that tendency. But how is it possible to satisfy any "*just* complaints against the validity and integrity of the first Commission" by such affirmances? It is conceivable how *un*just complaints might be regarded as thus "satisfied." If the complaints are "*just*," it would seem the way to satisfy them would be to right the injustice—to do justice respecting the matters as to which injustice was done. If the former Commission wrongfully rejected A's claim, would not a complaint on that score be "satisfied" by allowing it now? On the other hand, if the complaint were for wrongful allowance, would not a rightful rejection now "satisfy" it? Mark, it is the "satisfaction" of "*just complaints*" (if there be any), and not the vindication or condemnation of those complained of, that is signified in the clause.

In this sense the language comports with the terms and manifest spirit of the treaty, as will be seen.

We are not left to inference as to "the design of the new treaty." That is expressly stated in the instrument itself.

The resolution provides:

"That the President be, and he hereby is, requested to open diplomatic correspondence with the government of the United States of Venezuela, with a view to the revival of the general stipulations of the treaty of April 25th, 1866, with said government, and the appointment *thereunder* of a new Commission, to sit in the city of Washington, which Commission shall be authorized to consider all the evidence presented before the former Commission in respect to claims brought before it, together with such other and

further evidence as the claimants may offer, and from the awards that may be made to claimants, any moneys heretofore paid by the Department of State, upon certificates issued to them, respectively, upon awards made by the former Commission, shall be deducted, and such certificates *deemed cancelled*."

There follows a provision about distribution of certain Venezuelan funds in the Department of State.

The treaty recites that the proposal thus "authorized" by this joint resolution was duly made to and accepted by the government of Venezuela, and continues:

"The Government of the United States of America and the Government of the United States of Venezuela, *to the end of effecting, by means of a convention, arrangements for the execution of the accord thus reached between the two Governments*, have named their Plenipotentiaries to confer and agree thereupon as follows:" &c., &c.

It thus appears to have been the design of Congress, and to be "the end" of the present convention, to relegate original claimants and the parties substantially, *mutatis mutandis*, to the situation respecting these claims in which they were placed by the treaty of 1866—"*thereunder*" being the term used—except there were to be "a new Commission" and an enlarged field of evidence. "The design of the new treaty" is therefore essentially that of the old, and of course cannot pertain to matters extrinsic and subsequent in origin.

Again, something confirmatory of the contention that we constitute "a reviewing court," &c., is drawn from this alleged circumstance (page 40 of brief), namely:

"No matters can come before 'you' *except matters which have been once adjudicated* by an international commission created by an international treaty, such commission having the same dignity, authority, and jurisdiction of private rights under the treaty as have you."

This, in our view, is a mistake. The treaty does not limit adjudications before us to "matters which have been once adjudicated."

Article 2 confers the jurisdiction of the Commission. It provides:

"All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, *which may*

have been presented to their Government or to its Legation at Caracas, before the first day of August, 1868, and which by the terms of the aforesaid convention of April 25th, 1866, *were proper to be presented* to the Mixed Commission organized under said convention shall be submitted to a new Commission, consisting of three commissioners," &c.

The language of the treaty of 1866, in this respect, is identical with this down to and including the name "Caracas," then follow the words, "shall be submitted to a Mixed Commission," &c.

So it is that not only the claims actually adjudicated by the old Commission fall within our jurisdiction, but those also which were proper to be presented to it.

It is true the officer in charge of the American legation at Caracas advised the old Commission by letter, included in its minutes two days before its final adjournment, August 5, 1868, that all "unliquidated claims," &c., theretofore filed with the legation had been sent the Commission, and that the legation had no "official knowledge" of others. If at liberty to regard this letter, our conclusion would not be changed. There may have been claims filed at Washington, liquidated claims at Caracas, and still others sent the Commission and not considered, for aught that appears. And what if the officer was mistaken? But we cannot look beyond the treaty itself in determining jurisdiction.

Again, it is urged that the awards are under "review," because the Commission is to deal with them. Clauses from article 9 and the supplementary treaty are instanced in support. Article 9 speaks of what shall happen if "the Commission * * * shall, in whole or in part, annul any money awards," and one supplement treats of the understanding, &c., "in the event of any of the awards * * * being annulled in whole or in part" by this Commission. These expressions are to be considered and construed in connection with Art. 6, which provides, among other things, that:

"All certificates of awards issued by the said former Mixed Commission *shall be deemed cancelled* from the date of the decision of the present Commission in *the case* in which they were issued."

While, therefore, awards stand until the adjudication of the claims out of which they arose, their cancellation then *is effected by operation of the treaty.* The adjudication is not with respect to the awards, but the basal claims. The annulment of the former is a *consequence* of the "decision" of the latter.

For this reason, and in this sense, the Commission is spoken of in the passages cited, by permissible use, perhaps, of terms, as itself "annulling" the awards. This view is in harmony with the joint resolution of Congress referred to, which contemplated that the awards should be "*deemed* cancelled" in a similar contingency therein specified.

Turning now to what may be styled the jurisdictional parts of the treaties, to ascertain our duties in respect to adjudication, we find (see articles 1, 2, 3, 5, and 6 of the new treaty, and articles 1 and 2 of the old):

1. Exactly the same things, namely, certain "*claims*"—nothing but "claims"—are submitted to us that were submitted to the old Commission, and in substantially the same terms.

2. The same things are to be done with them by us as by them. These are described in identical terms in their "solemn oath" and in our "solemn declaration," to wit: To "carefully examine and impartially decide according to justice, and in compliance with the provisions of this convention [both conventions being the same in this respect] all claims submitted." We are commanded in the very terms of the direction to them, thus: "The Commissioners shall make such decision as they shall deem, in reference to such claims, conformable to justice."

3. We are commanded to proceed in the same way in the hearing of the claims as were they, the only substantial difference being—and that is not of method—that "other and further evidence" may be considered by us than that before them.

4. The evidence we may consider is prescribed, as it was

with them, being the same that was "admissible" before them, and the "further evidence" named in article 5; and there is not included in it former awards or adjudications.

5. After decision the present Commissioners are, as were the former ones, required to issue certificates of award for the sums to be paid claimants "by virtue of their decisions."

6. The new, like the old, decisions are made "final and conclusive" as to the claims submitted.

All things considered, we are led to the conclusion that the original claims submitted stand before us with respect to the hearing and determination thereof substantially as they stood before the former Commission, with the difference indicated in article 5, as to additional evidence; that we are engaged in a "rehearing" (Art. 8) of said claims, and not in a "review" of the former adjudications or awards pertaining thereto; and that in our considerations we cannot "concede" to such adjudications or awards "force and legal effect."

There remains, as before suggested, in each case, the fact of the former adjustment; also, the opinions pertaining to it. Whatever light these may give will, of course, be availed of. The action of the former Commission, like any authority consulted, will have such consideration as it is thought entitled to.

MUST CLAIMANTS APPEAR, OR BE PERSONALLY REPRESENTED?

The claimants in some of the cases have not appeared in person or by representative. Is such appearance necessary? While it is desirable, we think it not essential for the purposes of adjudication. Article 5 of the treaty provides for the consideration of the evidence admissible under the old treaty, "together with such other and further evidence as *the claimants may offer* through their respective governments," &c. By article 6 it is made the duty of the Commissioners in proper cases to issue certificates of award "TO *each claimant*," &c.; and under article 10, the Department of

State is required to distribute certain moneys "*to the holders* of certificates which may be issued under the present convention."

While the treaty, being a public law, is itself legal notice to everybody of what may be done in pursuance of it, yet in view of these provisions special pains have been taken to bring actual notice to all concerned of the pending proceedings, to the end of securing the appearance of claimants. Early notice was given by the Department of State, through the Associated Press, and inserted in newspapers of wide circulation, and other means of publicity employed.

Still there is a number of claims unrepresented, which, with all others in the submission, it is made our duty to decide, "*nolens volens*," as counsel for awardees insist, within the limits, of course, of our ability to do so within the year. We are disposed to concur in their views that *bona fide* certificate holders are equitable assignees *pro tanto* of the claims out of which the awards arose, and have allowed those claiming to be such to appear in support of such claims. But whether we have the power or means of finally determining who are such holders is altogether another matter.

While the decision of unrepresented claims is imperative, it does not involve the anomaly of adjudicating one's rights without his having a day in court. The parties to these controversies are the two Governments. They are represented by learned counsel. If they were not, the Commission is their joint agency, and its acts, within its authority, are theirs.

In general, as we conceive, a claim of a citizen of one state upon another state, when taken up on his petition and diplomatically pressed for payment against the latter by the former, stands and is subject to be treated, for the purposes of prosecution, disposition, and settlement, as if owned by the plaintiff state. For these purposes, and in this sense, it ceases to be an individual, and becomes a national, claim. Whatever settlement or mode

of settlement it may agree to or adopt, binds him. Such is the implied understanding when he accepts the aid of his government (see Diekelman *v.* U. S., 92 U. S. R., 524). And the state's position, as seems to us, is not merely of a representative character. It is essentially that of an interested party as well. Its interest is broader and deeper than a mere monetary one. It comprehends the general weal. The state, as a corporate existence, being an aggregation of individuals, is by common understanding, injured by injuring any of them. For his allegiance and services as a member of the community the citizen is entitled, as of right, while lawfully employed, to the return of the state's suitable protection against wrongs from without as well as from within its own confines. The observance of the obligation is fundamental and vital to government. Its violation involves a breach of trust disintegrating and destructive in tendency. Do away with its discharge, and government perishes. Impair the public confidence in that discharge by failure of duty in any instance, and the state suffers far beyond any possible injury to the citizen. Hence, in these controversies, the United States Government is not a perfunctory party, but a real—in an important sense *the* real —party (on one side) in interest; not, of course, to secure the allowance of unjust claims—in the nature of things it cannot vouch for validity in advance—but to assist as it may in securing justice to its citizens, whatever that may be. In truth, if a remark aside may be indulged, the real underlying interests of the two governments in this respect are identical. For it is as much the concern of the one, in a true international sense, to do justice as it is of the other to have justice done. Therefore, all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets, is a doctrine, it may be taken, lying at the base of the convention itself.

(Original in Spanish.)

Claim of

JOSEPH FORREST
v.
THE UNITED STATES OF VENEZUELA. } *No.* 5.

[March 2, 1890.]

ANDRADE, for the Commission :

1. On the 28th of May, 1812, sailed from New York for La Guayra the American schooner *William Yeaton*, Travers master, chartered by the Government of the United States to carry a cargo of flour intended as a donation "to the unfortunate inhabitants of the province of Venezuela," who had suffered by the earthquake of the 26th of March of said year, and consigned to Robert K. Lowry, Consul of the United States at La Guayra, where she arrived the 1st of July.

2. There she was found and detained, together with several other American vessels, without having completed the unloading of the flour, by the Spanish army of pacification, which, under the command of General Don Domingo Monteverde, had regained Caracas and La Guayra at the end of July, 1812, in virtue of the capitulation signed at La Victoria the 25th of that month by Monteverde and General Miranda, which delivered Venezuela up again into the power of Spain.

3. Sent to Puerto Cabello, she was, on adjudication, declared good prize and condemned by decree of the 23d of September following; but by means of the exertions of Forrest, her owner, and of persons near the new government, she was restored to him on the 26th of October.

4. On the 29th of October Lowry, the United States Consul, appointed a commission of surveyors to examine the schooner and value the damage that might have resulted to her by her seizure and occupation by the Spaniards, who reported that she had not materially suffered in consequence of those doings,

but that they considered her in justice entitled, because of her forcible detention of ninety days, from the 1st of August to the 28th of October, to a demurrage of $24 per day, or of $2,136 in all, which, to the best of their judgment, was the damage due to the owner or owners of the *William Yeaton* by her detention from the entry of the royalists into the port of La Guayra.

From such facts, has the claimant a right of action founded in justice against Venezuela?

The *William Yeaton* was chartered by the Government of the United States to carry a cargo of the property of the United States to the consignment of the United States Consul at La Guayra, and was detained, adjudged, and condemned by the royal authorities who succeeded the patriotic, at the end of July, 1812, in the possession of the province of Venezuela. Some pretext for a claim on Spain might thus be found in the circumstances such as the one put in by Joseph Forrest, although fruitlessly, before the Commission organized in Washington under the treaty of 1819 with that nation. Some plausible argument could likewise, to a certain point, be drawn therefrom for relief like that which, with better success, was a little later sought by him before the Congress of the United States, which, in 1825, finally ordered the sum of $2,136 to be paid to him on condition that, by such payment, the United States should be released from any further responsibility on account of said vessel. But against Venezuela, what sort of claim could ever be urged, in sound logic, from the foregoing facts?

It is alleged that the *William Yeaton* suffered two detentions: one from her reaching La Guayra, the 1st of July, until the 1st of August, when she fell into the hands of the royalists; and the other from the 1st of August to the 28th of October when she was returned by Spain; that the first one was owing to the negligence of the republican authorities of La Guayra in not hastening the discharge of the schooner as it was their duty to do, which was the immediate

cause of her seizure and second detention, with all the consequences thereof; that for the reasons expressed, Venezuela, within whose territorial waters the *William Yeaton* was seized, is to be held, in international justice as well as in conscience, liable to indemnity for the loss thereby occasioned.

But in the first place, the fault now set to the account of Venezuela for her behavior in connection with the unloading of the *William Yeaton* is comparatively a new one. In the petition addressed by Joseph Forrest in 1822 to the Senate and House of Representatives requesting indemnification for this vessel chartered by the United States, it was said that immediately after her arrival at La Guayra the agent of the United States had been notified of it and urged to take the flour from aboard, but that so far from doing so he refused to receive it otherwise than in small quantities, day by day. And about the same time (29th of April) it was stated under oath by Dulany Forrest, the successor of Travers in the command of the *William Yeaton* when the Spaniards seized her, what follows: "I think it was about a fortnight before *Mr. Lowry* would receive any part of the cargo, although constantly urged to do so by Captain Travers and myself. After the vessel began to discharge it was in small quantities, and sometimes for many days not a barrel would be received, although *Mr. Lowry* would always promise that he would attend to it, and that the vessel should soon be unloaded." That is to say, that both the first and the second master of the ship considered Lowry exclusively blamable for the delay in discharging her. Neither of the two expresses the least complaint or resentment for the behavior of Venezuela on that occasion. Neither to Lowry, so naturally interested in justifying his management as agent of the United States Government and consignee of the vessel and her cargo, did it occur to devolve the least share of responsibility on Venezuela; nor to the Secretary of State, John Quincy Adams, in his report to the Congress on Joseph Forrest's

petition; nor to William W. Rawle, of Philadelphia, in his written opinion with regard to Forrest's right to be compensated for the damage sustained in his property. And, be it remembered, they all wrote in 1822, ten years after the events, when no consideration either of a political or international respect bound them to observe in a matter of justice the slightest regard for Venezuela, who had already attained to her complete independence from Spain, and was an international person by act and right, capable to answer for her conduct. It is only at the beginning of June, 1840, 28 years after the events, that the inculpation alluded to appears for the first time conceived against Venezuela, in a letter addressed under date of the 3d of the said month to John Forsyth, Secretary of State, by James H. Causten, in which the latter does but repeat, word for word, the charge of having changed the vessel into a store-ship, &c., &c., that Forrest had already laid frankly and directly upon Consul Lowry in his petition of 1822 to the Congress of the United States.

In the second place, it is not just to impeach anybody without furnishing the proof of the fact imputed to him. The judge wants to know the truth in order that he may be able to righteously grant justice, and must necessarily bring it out by examining the proofs. It is not enough to say that the *William Yeaton* was converted by the local authorities into a store-ship, and moored in the "harbor;" it is moreover necessary to prove that the said authorities did really commit the wrong which they are accused of, and this appears not to be proved at all. If what Causten asserts in the name of his client about the middle of 1840, and much later Alexander Scott, had been true, Lowry would have given at once notice thereof to the interested parties, and these would certainly not have failed to complain of it in any of the several documents by which they ever endeavored to justify their claim, to wit: first, against Spain, and afterwards against the United States—from Captain Travers' protest at La Guayra, on October 13, 1812, to Forrest's pe-

tition to Congress in 1822. In default of better justification to the contrary, the uninterrupted silence of the consignee and the captain of the vessel may be justly considered as satisfactory evidence that the authorities called by the law to assist in discharging her were innocent.

In the third place, it is a principle of international law, well recognized by civilized nations, that governments are not ordinarily, at least, held to be responsible, pecuniarily, for the acts of their officers in the exercise of their public duties, a principle more than once supported by the opinion of the most prominent American jurisconsults. In 1855 (May 27), answering to an argument of Mr. Osma, the Minister of the Peruvian Republic in the United States, Hon. Caleb Cushing said:

"In the transaction of public affairs, there are two classes of officers—one employed in the collection of the revenue and the care of the public property, who represent the proprietary interest of the Government, and another class who are the agents of society itself, and are appointed by the Government only in its relation of *parens patriæ*. For the acts of the former the Government holds itself responsible in many cases, because their acts are performed for the immediate interest of the Government; but, for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the Government."

And, in 1871, another Attorney-General of the United States, A. T. Akerman, on the case of alleged corruption of a municipal judge of Brazil, in authenticating and ratifying the report of a board of surveyors upon a damaged vessel, advised as follows:

"Even if the charge of corruption were established, which does not appear to be the fact, I am of opinion that the Brazilian government would not be responsible. The misconduct violated no treaty stipulations between Brazil and the United States. It did not benefit the public treasury of that country, but was in aid of a private interest."

Calvo sustains the same opinion:

"Within the circle of jurisdictional limits," says he, "all the agents of the authority are personally and solely responsible for their acts in the measure established by the internal public law of each State. When they fail to fulfil their duties, exceed in their powers, or violate the law, they

create, according to circumstances, in behalf of those whose rights they injure, a legal remedy in conformity with administrative or judicial procedure; but in relation to third parties, native or aliens, the responsibility of the government that has appointed them is purely moral, and it could not become direct and effective but in the case of complicity or of manifest denial of justice."

So that, even if it had been proved, which is not the fact, that the authorities of La Guayra were negligent in affording to the *William Yeaton* all the means left by the law at their disposal for the speedy unloading of vessels, yet, in order that their fault might be morally imputable to Venezuela, it would be necessary to prove equally, according to the above stated doctrine, that said authorities had acted in compliance with direct orders from the government, or that it, having been informed of the facts, had not taken the proper steps to arrest or prevent their consequences.

In the fourth place, the aid and protection to which civilized nations are mutually bound by rigorous international duty, are those of their respective laws and courts of justice. "Aliens (see Bluntshli, Codified International Law) have a right to the protection of the laws and customs of the country for their persons, families, and property." And farther along: "No State is obliged to grant to aliens privileges or personal rights inconsistent with its own constitution or statutory laws."

But even that duty, imperative as it is, ceases to be obligatory, following Calvo, as soon as war breaks out, "because it then collides on the one hand with the sovereign right of the belligerents, and on the other hand with a still more imperative duty—that of neutrality."

"War, as Calvo defines it, is the state of hostility, taking place of the relations of good harmony between nation and nation, or between citizens belonging to different political parties, and the end of which is to obtain by the force of arms what has not been possible by peaceful and amicable means."

Its effect is always to the extinction of the rights arising out of peace. Thus the nation which, during the state of war,

continues to fulfil its duties towards the friendly and neutral ones, as if at peace, does more than it is bound to by international justice.

When the *William Yeaton* arrived at La Guayra, Venezuela was in flagrant war with Spain, struggling for the defence of her last intrenchments, and on the eve of losing her independence; still no proof or evidence whatever has been produced against the custom officers or the port authorities of La Guayra, not even of involuntary omission of any of their official duties in the case under discussion. To declare her obliged besides to protect foreign property against all the risks of war, when she was unable to defend her own citizens, not even the supreme good of her independence and political sovereignty, would be to understand justice otherwise than it has been regularly understood in the international society as well as in that of the *equo bono*. No nation can be required to do for others what she has not been able to do for herself.

"States equally as individuals, turns Calvo to say, owe to each other aid and protection; it is impossible to establish in this respect general and strict rules; but it may be assured that the State accomplishes its duty where it affords to others the relief it owes to itself."

Beyond that even the law of humanity does not bind.

Shown that neither the law of nations nor that of humanity, neither the laws of peace nor those of war do impose any liability upon Venezuela in the case of the *William Yeaton*, it is not easy to see how conscience could impose it. The act of conscience determining the individual duty is the conclusion of moral sense drawn from two premises or antecedent propositions, one general and the other particular, like those of a syllogism. Applied to our subject the general premise would be, for example: "The State fulfils its duty where it grants to foreign property the same protection it extends to national property," what has already been proved. The particular premise, equally proved already, would be: "Venezuela did protect the *William Yeaton* in

the same degree she protected Venezuelan property." Conclusion: "Venezuela fulfilled her duty." Then, neither the dictate of conscience makes her responsible. Nor upon grounds of gratitude is Venezuela to be held obligated to the claimants. The *William Yeaton* was certainly the carrier of the United States' donation to the province of Venezuela, but under an affreightment contract and a pecuniary compensation freely agreed to between her owner and the United States. The people and Government of the United States were the true and sole donators, and it is towards them that Venezuela exclusively assumed the obligation to compensate with affection and gratitude for the national act of gratuitous kindness which was the object of the *William Yeaton's* voyage.

Our conclusion is, therefore, that this claim, which is for $5,655.18, must be disallowed.

Claim of

JONATHAN T. MORRILL
v.
THE UNITED STATES OF VENEZUELA. } *No.* 9.

[April 2, 1890.]

Case of the brig *Horatio*—claimants, Annie E. Jones and Isaac B. Lewis, executors of Jonathan T. Morrill.

FINDLAY, for the Commission:

It appears from the papers in this case that the brig *Horatio*, of about one hundred and eighty (180) tons burden with North American register, of which Jonathan T. Morrill was master and part owner to the extent of one-fourth, the other three-fourths being owned by a Mrs. Dorothy C. Aranguren, sailed on the 29th of July, 1851, from New York for Maracaibo, *via* St. Thomas. On the voyage out she encountered heavy gales and suffered severe injuries, all of which were repaired with the exception of the damage to her copper sheathing, which was chafed and in some places broken, but there being no port en route where this damage could be repaired, the captain determined to continue on in his voyage.

He arrived out at Maracaibo on the 27th of September, having been two months on the voyage, and proceeded, as he states, to discharge his vessel and take on board a homeward cargo of hides, fustic, and coffee, intended to be delivered at the port of Philadelphia, and all of which he accomplished by the 5th of October, a procedure which, he says, was hurried by his anxiety to get out of the waters of Maracaibo as quickly as possible on account of the defenceless condition of his vessel against the sea worms, which swarm in that quarter and are very destructive. Accordingly, on this day, which fell on a Sunday, he took out his clearance papers from the custom-house, including a sea-pass, which had to be countersigned by the commandant at San Carlos,

and securing the services of a river pilot, dropped down the river without delay or obstruction until he reached the fort, about half-past three in the afternoon. Here it was necessary to discharge the river pilot and take on board what is called a bar pilot, and also get his sea-pass countersigned by the commandant; and for this purpose he sent his second mate on shore, he keeping on to Bajo Seco, having directed the mate to meet him there with the pass and the pilot. The mate proceeded to shore in a yawl, secured the signature of the commandant to the pass, and returned to the vessel, but without the pilot. It seems that while on shore, or just as he was pushing off, he had a personal encounter with a pilot, the particulars as to which are neither very clear nor full, and come entirely from one side—that is, the mate's—but which resulted in the pilot, who had come on board the yawl, being landed, and the mate's return to the brig without him.

The next day, which was Monday, the head pilot, in company with another pilot, came to the brig, and the head pilot, so the captain says, refused to take his vessel to sea unless he put his mate on shore, presumably to be punished for the collision the day before, but to this the captain objected, saying that he had no right to put his mate ashore, and that, if the authorities wanted him, they could come and take him. He also says that he then and there—that is, on the 6th of October, declared to the head pilot that, if he refused to take his vessel to sea, he would make his own soundings, and take the brig to sea himself without the aid of a pilot. The head pilot appears then to have left the vessel, but the pilot who accompanied him remained on board during the night, and the next day, as the captain states, made an ineffectual, but not a real and earnest, effort to take the vessel over the bar. Day after day, so the captain states, a pilot would come on board, head the vessel towards the bar, but always take care, under some pretext or other, to stop inside; and, while this farce was going on, other vessels—some flying the Venezuelan and

some the Dutch flag—were taken to sea under his very eyes, and the pilots were chaffing and laughing at him instead of doing their duty. Time and again, he says, both wind and tide were favorable, and there would have been no difficulty in getting him over the bar if the pilots had not determined to punish him for refusing to put his mate ashore. For four days before the 15th of October, he says, no pilot appeared on board at all, and on this day he proceeded, as a last desperate resort, to carry into execution the threat or declaration he had made to the head pilot on the 6th, that he would take soundings and pilot his own craft to sea. Accordingly, in the afternoon, he took soundings, ascertained as best he could the depth of the water, and with this information waited until the next day, when he intended to sail without a pilot.

On that day, however, which was the 16th, a pilot came on board and headed the vessel, as usual, for the bar; but had not gone very far, when he hove to, in obedience to a signal from the shore. The meaning of this was that the commandant learning that he had taken soundings as described, determined to arrest the vessel for a breach of the port laws. It appears that there was an old Spanish law enacted in 1793, which prohibited any soundings to be made in the interior waterways or channels in the vicinity of arsenals or other fortified places, by national or merchant vessels, permitting, however, such soundings to be made on outside bars or bars of entrance, on a permit being obtained from the captain of the port, in which permit it was necessary to "prescribe the boundaries of the examination according to the scope of general utility."

This old law or ordinance, a translation of which together with the resolution of the 8th of May, 1843, organizing the corps of pilots for the bar of Maracaibo, is appended to this opinion, was held by the authorities to be in force in Venezuela, and for a breach of this law the commandant arrested the vessel. The upshot of this arrest was that the

captain returned, in another vessel, to Maracaibo, placed himself under the protection and direction of the U. S. Consul, Mr. Roland Dubbs, and in due course noted a protest against the seizure, on the 22d of October, which was afterwards extended on the 25th of the same month. It appears that the Governor offered to release the vessel on security to pay whatever penalty might be awarded for the breach of the soundings law, and that this was declined by the captain, who refused to accept any terms which did not recognize the responsibility of Venezuela in making the seizure. The Governor, however, on the 19th of November, determined to release the vessel, having in the meantime made an investigation which satisfied him that the offence of the captain was not a malicious one, and that he had been punished sufficiently already by the detention of his vessel; and the order of release was accordingly signed, but on examining the vessel it was discovered that she was practically unseaworthy, owing to the ravages of the worms; and in consequence, after a survey, establishing this fact, all that was valuable belonging to her was sold for the sum of $1,461.15, her cargo in the meantime having been transferred to the *Irina*, bound for Philadelphia under an agreement as to freight with her master. Out of these circumstances this claim arises, and it is preferred for the value of the brig:

Claimed as a total loss	$10,000 00
Freight charges by *Irina*	2,628 71
Expenses of transferring freight, crew's wages, etc.	3,421 32
	$16,050 03
Credit by cash, sale of brig	1,461 15
	$14,588 88
Interest from the 1st of November, 1851, to 1st of September, 1890	33,992 09
Total	$48,580 97

Although not separated and specifically counted on in the petition there would seem to be two distinct grounds for this claim, and this two-fold character is referred to in the brief filed by the counsel for the United States. These grounds in the order of time are, first, that Venezuela is responsible for the failure of her pilots to take the brig to sea, and secondly, that she is responsible for the arrest and detention of the vessel, for the violation of the soundings law, and for all the consequential damage which ensued, because the subsequent release of the vessel carries with it an admission that there was no probable cause for her seizure in the first instance.

As to the first ground of complaint, accepting the captain's version of the story, it is obvious that the pilots, out of revenge for the conduct of the mate towards their companion, had determined to harass the master of the ship for the part they claimed he took in shielding his officer by refusing to send him ashore, and it is equally obvious that Captain Morrill had made up his mind *on the very day* that the controversy came to a head, to make himself independent of the pilots, and, if necessary, proceed to sea without their aid. Taking his statement, and this is all we have before us, except as corroborated by the mate himself, it is very clear that time and again his vessel could have cleared the bar if the pilots had not been trifling with him. He swears that not only were the wind and tide favorable on more than one occasion, but that other vessels were actually taken over the bar, when he was constrained by the tantalizing conduct of the pilots to languish inside, and that this mock procedure continued for at least five consecutive days, say from the 6th to the 11th of October. On other days no pilot would answer his signal, although he hung out his colors. Now, let us suppose, and there is certainly, on the captain's statement, a very violent presumption in favor of the hypothesis, that the head pilot, having heard the threat of the captain as to the soundings, and being resolved on revenge, saw his

opportunity in this very threat, and determined to make the most of it.

Knowing of the existence of the port law which prohibited soundings to be made within certain channels, and having the word of the captain that he would make these soundings under certain conditions, the head pilot communicated a hint to his men to vex and tease him by delays and shortcomings into executing his threat. The captain, ignorant of the law, falls into the snare, makes his soundings, is reported at once, and his vessel is seized. Upon the assumption that this is what occurred, would the captain have any claim against Venezuela, assuming also that she is fully responsible for the action of her pilots, as a body of officials licensed by the Government? It seems to us that before such responsibility could be justly established, the captain ought to show that as soon as he discovered that the pilots were playing false with him, he lodged a complaint with the proper authority, and insisted upon his right to be taken to sea by the officers appointed for that purpose. One or two abortive attempts might have been made to cross the bar without arousing his suspicion, but having good cause to suspect that they had a motive for their conduct, it is difficult to believe, on his statement, that he did not perceive that the pilots, after failing day after day in their duty, meant to do him injury, and that they were carrying out the threat which he says the head pilot had made on the 6th of October. Now, instead of complaining of this conduct to the captain of the port and avoiding the trap, which ordinary penetration would have discovered had been set for him, he falls headlong into it by carrying out the threat which he had made at the same time, which amounted to this: If you pilots break the law by refusing to carry me over the bar, I will break the law, too, by going to sea without your aid.

It must be borne in mind that the captain or his representatives are now seeking to hold not the *pilots* but *Venezuela* responsible for this dereliction of duty. It is possible

on the case stated that an action might lie against the Association of Pilots, if one existed, such as we are familiar with in some of the States; but the relief sought here is against Venezuela, and on the plainest principles of justice we think that the authorities of that country should have been appealed to, for the purpose of compelling the pilots to do their duty, as a necessary condition precedent to any action against the Government.

We have reached this conclusion on the statement of the case made by the captain himself, in the form of extracts from the log-book of the ship, and which was sworn to by him on the 22d of March, 1867, and upon the concession, for the purposes of the case, that a counter statement made by the pilots would not have varied in any important particular from the captain's statement.

We have taken the statement made up from the log-book because it is authenticated by the oath of the captain, and differs somewhat from the case as presented by the typewritten papers which constitute the memorial now presented by his representatives.

Any one reading this memorial would infer that the pilots had refused to come on board the brig, whereas it is clear from the sworn statement made up from the log-book that they came on board day after day, the offence there charged being that they made pretence merely of taking the ship to sea. It is a matter of no great moment, however, as in either case the charge is that the captain was wronged by Venezuela by the failure of her pilots to do their duty. Conceding that the charge is true as made, we think that Venezuela was entitled to notice of this dereliction on the part of the pilots before she can be held responsible for conduct which there is not the slightest proof she ever authorized or affirmed. On the contrary, there is the amplest proof in the record that up to the time of the unfortunate collision with the mate on the 5th of October, the captain was accorded every facility to discharge his vessel and take on his homeward cargo, all

of which he says was accomplished with unusual despatch. He had no difficulty in securing his sea papers and procuring a river pilot at Maracaibo, and without doubt would have kept on in his voyage unobstructed if it had not been for the encounter alluded to at San Carlos. There is not the slightest evidence in the record that we can discover which shows any malice or bad feeling towards the captain by the authorities of Venezuela. If some subordinate agents of hers, for personal grievances of their own, conceived a dislike for him, and determined to convert a breach of their official duty towards the Government into the means of punishing him and gratifying their private malice, there is no principle we can conceive of on which the Government could be held responsible for a wrong done to it as well as to him, unless in some way it is connected with that wrong by authorization or adoption.

On the whole, then, we conclude on this first ground of claim, that the claimants, on their own statement, have failed to make out a case against Venezuela.

As to the second head of liability, it was contended that the old Spanish ordinance or port regulation concerning soundings was not in force in Venezuela; or, if a part of her code, had become obsolete by reason of long disuse. Again, it was claimed that a provision in the ordinance, requiring that it should be posted in conspicuous places, so as to give notice to sea-faring men, had not been complied with, and as evidence of this, the testimony of masters of vessels was adduced, showing, in the instance of one of them, that he had made over a hundred voyages to Maracaibo, and had never heard of the law; but, on the contrary, that soundings such as Captain Morrill made were by no means infrequent, and had been suffered to pass with impunity. In addition, the captain alleged that as matter of fact, the field of his operations was not within the prohibited bounds, but was confined to an exterior channel or entrance where such soundings could innocently be made. Whether the captain knew the law or not, can afford him no defence for its violation if such a law

existed. Neither foreigner nor native can plead ignorance of the law as an excuse for its violation. This is a fundamental principle absolutely essential for the maintenance of social order, which tolerates no exception, and from the consequences of which there is no escape. It is to be observed, however, that whatever may have been the captain's information as to this specific ordinance, he was well aware that the usual and customary mode of taking vessels to sea was to secure the services of a pilot, and that he was making a departure from this well-established rule when he determined to proceed without one. On the very day the order was received for the detention of his vessel, the 16th of October, she was in charge of a pilot, who was then proceeding with her across the bar, and there is nothing in the record to show that he would not have accomplished the passage if he had not been stopped by the order, except the previous conduct of the pilots in refusing or failing to do their duty. When, in response to the threat made by the head pilot, on the 6th, the captain rejoined with a counter threat that if he was denied the customary pilotage he would discharge that duty for himself, there is evidence, we think, in this declaration of a settled purpose, under certain conditions, to accomplish his object regardless of the law.

The fact, conceding that it is a fact, that the law had not been published as required, would afford good ground for the exercise of executive clemency in saving him from the infliction of the penalty, but can afford no excuse for the breach of the law itself. Whether there was such a law in force in Venezuela at the time appears to us sufficiently clear from the record. There is a translation of the ordinance, which is declared by the executive authorities to have been in force, and also a translation of the same ordinance furnished us by the learned counsel for the United States, besides the translation appended to this opinion. There is no evidence before us that such was not the law, and it could hardly be expected that we should find against the existence

of a statute or municipal regulation of another country by our own unaided researches, in the teeth of an express avowal by the Executive of that country that such a regulation existed, which was partially enforced in this very case, and the enforcement of which has given rise to this controversy. As to the fact alleged by the captain—that the examination made by him was not within the prohibited bounds—we can only say that we do not consider that fact proved, and that besides it appears, from this ordinance, that, while soundings were permissible on outside bars, or bars of entrance—and the public anchoring ground for merchant vessels (which may be accepted as the *locus in quo* of the captain's operations)—this could only be done on the terms before quoted; that is, by the permit of the captain of the port, prescribing the boundaries of the examination.

There is no pretence that the captain complied with this regulation, his defence being that he was ignorant of the ordinance altogether.

For these reasons we do not think that the claimants can lawfully enforce their claim for damages against Venezuela on this second head of liability. To hold otherwise would be, in effect, to assert as a principle of international law that the citizens of one country injuriously affected by the enforcement of the municipal regulations of another, had good cause for reclamation in the absence of any proof whatever, that the offending country had wantonly or maliciously abused its power, a doctrine at war with all authority and practice, and the very statement of which carries with it its own refutation. It was insisted, however, that Venezuela was concluded, on this question of good faith, or probable cause for arresting and detaining the vessel, and in proof of this proposition it was seriously urged that her subsequent release without conditions was a conclusive admission of the illegality of the seizure in the first instance. To this proposition we cannot assent, as it would be a conversion of the clemency of the Government into an instrument for its own punishment,

and if accepted as a precedent for the government of cases in the future, would compel the prosecution of every case of seizure for the technical violation of laws, to a final decree, either for fine or confiscation, with all the costs and delays which such a litigation would involve to innocent claimants, as the only means by which the Government could escape ultimate responsibility.

If Venezuela on investigation chose to release an offender against her laws, instead of exacting the full penalty for their breach, we are at a loss to conceive how this can be construed into an admission that the law was not violated.

This opinion has already been protracted to undue length, but we feel constrained to make one or two observations more before concluding. The brig is claimed as a total loss, and the claim is made against Venezuela as the cause of this loss. The evidence very clearly shows, and, indeed, the admission in the case is that the entire damage was caused by the sea worms. The arrest and detention of the vessel constitutes the *nexus* or bond of connection between this injury and Venezuela, the argument being that if the vessel had not been unjustifiably detained the worms could not have committed their depredations. But is it not very clear that the brig came into the harbor in a defenceless condition, and was a fit victim for the attack of these pests? Her copper was chafed, and in some places broken, and the sheathing was so imperfect that her hull was perforated and honeycombed by the worms.

She arrived out on the 27th of September and sailed on the 5th of October following. Here were, say, seven or eight days for the worms to operate in before there was any detention of the vessel by any one. The pilots trifled with her for eleven days more, making nineteen days in all, before she was seized by the commandant on the 16th of October. She was finally released on the 19th of November. By what rule of apportionment could we ascertain the amount of damage done by the worms during these two periods of

time? We have no evidence before us as to the mode by which these worms do their work or the length of time necessary for them to accomplish their perfect work. But assuming that the longer time they had to work in the more perfect it would be, the question recurs, how could we divide the damage for which Venezuela might be held responsible *after* the detention, from that on which she is clearly not responsible, *before* the seizure of the vessel? Clearly we cannot, and besides, while it may be conceded that the arrest and consequent detention of the vessel afforded greater opportunities for the commission of ravages by the worms, it is equally true that if the vessel had been properly protected, these ravages would not have occurred. At the same time it may be observed, that we might not be very nice or critical in inquiring into this point if there was any evidence before us to show that the vessel had been arrested wantonly or maliciously and without justifiable cause. That is the turning-point in the case, and, as we have before remarked, there is no evidence that we have been able to discover sufficient to fix the liability of the Venezuelan government. There is another observation to be made which concerns the manner in which this claim has been presented. It appears that Captain Morrill on his return from Maracaibo in the winter of 1852, drew up a memorial setting forth the facts of his case, accompanied by his affidavit and the deposition of certain witnesses, and that these papers were forwarded to Washington, presumably to the State Department, and were afterwards lost.

In anticipation of an accident of this kind copies were carefully made and retained, and it is these copies, together with the correspondence of the U. S. Consul, and with what appear to be certain *originals* which ought to have gone with the Washington package, which were submitted to the Commission at Caracas, and constitute the evidence now submitted to us on which our award is asked.

We have looked through the correspondence of the State

Department as far as the index would enable us, and we cannot discover that this claim was ever presented by this Department to the Government at Caracas, or, indeed, any mention of it, although it appears that reclamation was made on account of another vessel called the *Horatio* about a year before.

While, therefore, we do not forget the language of the treaty which, in the second article, provides for the consideration of claims presented *either* to the Government of the United States *or its legation at Caracas*, and might consider this as one falling within the terms of the latter provision, yet still we cannot escape the force of the circumstance that as far as the evidence before us is concerned, it does not appear that the United States ever adopted the complaint of Captain Morrill, although it does seem that he presented his complaint in due form to that Government.

The original papers were lost after being put in the mail for Washington, but whether they were lost in the course of transmission or after they reached their destination, does not appear. If they were lost in the mail the retained copies could have been forwarded in their place, and this would have been an easy way also to repair the loss if it had occurred after the papers had been placed on file in the Department of State. But no effort appears to have been made to secure the good offices of the Government at Washington, except the abortive attempt to send on the papers in 1852, and after this failed nothing more is heard of the claim until the alleged copies, some fifteen or sixteen years afterwards, along with the original protest, survey, &c., are submitted to the Commission at Caracas. This failure on the part of the claimant to prosecute his claim with diligence, and the apparent refusal of his government to undertake the prosecution of it for him, when the matter was recent, assuming that the papers passed under its cognizance, are both circumstances which cannot be ignored in the consideration of the case as it comes before us, and on the whole with-

out allowing ourselves to be prejudiced by the adverse action of the former Commission, we will sign an order rejecting the claim and dismissing the petition.

Resolution of the 3d of May, of 1843, *organizing the Corps of Pilots for the Bar of Maracaybo. Department of War and Marine.*

Art. 14. Pilots, before entering in possession of their charge, shall be instructed of all their duties, and likewise of what is prescribed in Art. 123, f. 5th, tit. vii, of the ordinances.

Art. 27. When the pilots on board a vessel commit a fault, the captain of the vessel shall give notice thereof to the captain of the port, who, in view of any information he may find fit to acquire, shall correct the fault committed.

Art. 28. In order to inflict the penalties that may be prescribed, a verbal process shall precede, stating the fact by which they are caused, and before executing the same notice shall be given to the indicted.

General Ordinances of the Naval Army.

Art. 123. In order that it may never be alleged ignorance of the penalties established for culpable losses and shipwrecks * * * the captain of the port, before giving the pilots possession of their places * * * shall acquaint them *that in case of loss caused by malice, the penalty may be extended even to death, according to circumstances.* * * *

Art. 134. It shall be prohibited to any vessel, either national or foreign, to send her boat for the purpose of sounding within the internal channels of any arsenal-ports or others connected with the defences of the place. The ship incurring such a fault shall be laid on embargo, keeping on board the men necessary for her custody, and the captain and rest of the crew shall be arrested and sent on shore to be prosecuted by the captain of the port, if nationals, or by the governor if foreigners, transferring the cause to my person for the decision it may please me, according to the malice of the fact. But the examination shall be permitted of the external or entry shoals and of the public mercantile anchoring ground, the practical knowing of which affects the common good of navigators and commerce: *Provided*, permission therefor be asked of the captain of the port, that he may prescribe the limits of the examination consistently with the ends of general utility.

Claim of

JOHN H. WILLIAMS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 36.

[April 2, 1890.]

LITTLE, for the Commission:

It appears from the papers transmitted us that in 1841 John H. Williams, a merchant of New York, sold and delivered in that city to an agent of the Venezuelan government certain mirrors with mountings for the Government House at Caracas for $2,489.11, which were duly forwarded and received.

On the 24th day of April, 1868, Mr. Williams presented the account against that government before the former Commission for these articles as of the date of November 9, 1841, and verified it under oath, claiming an award, including interest at 7 per cent., of $7,019.11. The account had before been sent to the United States Legation at Caracas for collection, but how long before does not appear. It had not, previous to 1868, been brought to the attention of the Venezuelan authorities from any source, so far as shown, and no reason or explanation is given for delay in presentation.

Venezuela claims the goods were paid for at the time of purchase. On the issue of fact thus made she was, 1868, and is placed at a disadvantage by the long lapse of time as to the matter of personal testimony, some, if not all, her witnesses to the transaction having before then died.

The question with some collateral ones is thus presented whether time, figuratively stated, testifies in these adjudications. This case could perhaps be disposed of upon other grounds and in comparatively few words; but as the same question with like resulting ones is involved in other cases argued and submitted, we have concluded to treat it with

some fulness and dispose of the case from this standpoint, in view of the fact that the general question appears to be a somewhat mooted one with each government.

PRESCRIPTION.

It thus appears then the claim was not brought to the attention of the Venezuelan government until twenty-six years after its inception. Its ownership, nature, and amount were such as would have made a delay in presentation to the debtor for a single three-months, a matter of surprise. By lapse of time the means of defence have been impaired, and there is total want of excuse for the long delay by claimant. Under such circumstances what does the law require at our hands?

It is a well-settled principle in common law jurisdictions, and a recognized one in civil law countries, that obligations are to be enforced according to the *lex loci fori* which here is the treaty and the public law. Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the Commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direction of international law on the subject. Does that recognize the doctrine of such extinguishment as between states, in controversies like these? The question has been argued with exceptional force and ability by counsel for the respective governments.

It will, perhaps, not be amiss to group extracts from the deliverances (italics ours) of some of the leading authorities upon the general doctrine of prescription and pertinent principles. We present them as they have been consulted, and without reference to any special order. It may be well preliminarily to note that, while individual interests are involved, these controversies, as elsewhere seen, are between States in some sense, and stand much as if so originating; and, further, that while the texts will be seen largely to relate to territorial acquisitions, the principles announced compre-

hend the acquisition and loss of personal property and pertain to other rights as well.

Says Wheaton:

"The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it is called, the uninterrupted possession of territory *or other property* for a certain length of time by one state, excludes the claim of every other; *in the same manner as by the law of nature, and the municipal code of every civilized nation, a similar possession of one individual excludes the claim of every other person to the article of property in question.* This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect of the original defect of his title, or his intention to relinquish it." (Elements Int. L., 6th ed., 218.)

Vattel:

"It is asked whether usucaption and prescription take place between independent nations and states. * * * Now to decide the question we have proposed we must first see whether usucaption and prescription are derived from the law of nature. Many illustrious authors have asserted and proven them to be so. * * * It is impossible to determine by the law of nature the number of years required to found a prescription; this depends on he nature of the property disputed and the circumstances of the case.

* * * * * * * *

After having shown that usucaption and prescription are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations and ought to take place between different states. For the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned. And so far is the nature of the parties from affording them an exemption in the case, that usucaption and prescription are much more necessary between sovereign states than between individuals." (Law of Nations, Book 2, ch. 11.)

"Prescription," this author defines in the same connection, "is the exclusion of all pretensions to right—an exclusion founded on the length of time during which that right has been neglected."

Phillimore:

"This [prescription of public law] is in principle very much the same as the prescription of the private law; which indeed may be said to be modeled upon the usage of the public law, *and which usage grew out of the reason of the thing.* * * * Does there arise between nations, *as* between individuals, and *as* between the state and individuals, a presumption from long possession of a territory, *or of a right*, which must be

considered as a legitimate source of international acquisition? * * * The effect of the lapse of time upon the property *and right* of one nation relative to another is the real subject for our consideration. And if this be borne steadily in mind it will be found on the one hand, in the highest degree, irrational to deny that prescription is a legitimate means of international acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established, or in other words, to settle the precise limitation of time which gives validity to the title of national possessions." (Int. Law, 1, pp. 272–5.)

Hall:

"The principle upon which it [International Prescription] rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application to beings for whose disputes no tribunals are open, some modifications are necessarily introduced." (Int. Law, 100.)

Polson:

"How far prescription may be considered as operating upon nations jurists do not appear to have agreed; but the uniform practice of nations shows that they recognize the long and uninterrupted possession of a territory as excluding the claims of all other nations. *and that this principle*, whose exposition fills so large a head in municipal jurisprudence, *is equally recognized, as reason dictates it should be, in international law*" (Law of Nations, 28.)

Calvo:

"May usucaption and prescription be considered in regard to peoples and states as regular and normal means of acquiring property? If it is admitted that these two ways of acquiring are legitimate and based on natural law, one is logically bound to admit that they are equally conformable to the principles of the law of nations, and are to be applied to nations.

Unsucaption and prescription are even more necessary between states than between individuals. In fact the differences between nations have a much greater importance than individual contentions; these may be settled by tribunals, whilst international conflicts frequently end in war." (Droit International, vol. 1, § 171.)

Vico:

"The inert, the incautious, the negligent, the luxurious, are punished in the injury they do to themselves by the loss of their interests and their rights through usucapio and prescriptio." (De Uno Universi Juris, &c., p. 331.)

Grotius, while seeming to indorse Vasquius in denying usucaption a place both in public and private international

law, except as established by municipal law, is at pains to point out its national recognition from the earliest times. Among other instances he tells that, to the demand of the king of the Ammonites for the restoration of certain lands between the Arnon and the Jabbok, and from the deserts of Arabia to the Jordan, the leader of Israel opposed a three-hundred-years possession, and demanded to know of the king why he and his forefathers had been quiescent so long. Also, that "the Lacedæmonians, according to Isocrates, laid it down as a most certain rule, acknowledged among all nations, that public possessions as well as private are so confirmed by length of time (*multo tempore*) that they cannot be taken away. By which *natural law* (*quo jure*) they refused those who were seeking the recovery of Messina." (De Jure Beli et Pacis, Lib. 2, cap. 4.)

Taparelli:

"Hence the law of prescription—a necessary and just law—by means of which, society stops, through certain limitations, all inquisitions of ancient rights.

* * * * * * *

Most reasonable is, therefore, the law of prescription in the natural order, although nature itself does not overtly establish its strict necessity, nor fix its proper limitations. This is to be performed by society as it grows more and more perfect; and it is as much the more its office, as it is therefrom and therein that the social complaint requiring such a remedy takes its rise." (Natural Law, vol. 2, 979.)

Sala:

1. By using anything with just title and good faith, the right of possessing it is likewise acquired; but this manner of acquiring is considered to be civil, because of its being at first view resisted by natural reason that does not allow anybody to be deprived of his possession without his fault or consent, although it does not cease to have great equity, as it is grounded on the requisitions of public good; so that we have no great objection to say that it can also be referred to the secondary law of nations.

2. To this manner of acquiring the Roman laws gave the name of usucaption or prescription. * * * and it is but acquisition of *dominium* by continued possession during the time determined 'by the law.' Its introduction was made necessary from public utility and the tranquillity of the republic, because, in default of it, possessors of things would be subject to unlimited disputes, which their long possession, even though acquired by sale

or any other legitimate title, would not be enough to prevent. Any one would be enabled to claim that the thing belonged to his ancestors, and never to him who sold it, and possession would keep uncertain, and the state subject to the grievances that may be easily conceived. . With reason did Cicero call it the end of solicitude and disputes." (Illustration of Spanish Law, vol. 1, book 2, title 2.)

The Supreme Court of the United States, in Rhode Island *v.* Massachusetts (4th Howard, 639) said :

"No human transactions are unaffected by time. Its influence is seen over all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, *whether of states or of individuals*, long possession under the claim of title is protected."

And again, in Wood *v.* Carpenter (101 U. S., 139), although the question was as to a statutory bar, the observations of the Court apply as well to the grounds of prescription. Said Mr. Justice Swayne :

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate activity and punish negligence. *While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.* Mere delay extending to the limit prescribed is itself a conclusive bar The law and the antidote go together."

Lord Coke, while declaring limitation of actions to be by force of statutes, wrote :

"But they have said that there is also another title by prescription that was at the common law before any estatute of limitations, and, inasmuch as such title by prescription was at the common law, *ergo* it *abideth* as it was at the common law."

Bracton, who wrote long before the first English progressive limitations act (1540), and before Parliament named events as bounds of limitation, even, said :

"We must see also in what manner an obligation is got rid of; and it is known it is likewise got rid of sometimes by an exception in various ways; as if a person should claim, and another should show he has discharged it. * * * Likewise by an exception of a prescription on account of defect of proof, because, as time is a mode of bringing in an obligation, so it is a mode of getting rid of it through dissimulation and negligence, which is limited

under certain times, for *time runs against the indolent and those who are careless of their right.*" (Twiss' Bracton, vol. 2, p. 123.)

Sir Henry Maine:

"It was a positive rule of the old Roman law—a rule older than the Twelve Tables—that commodities which had become uninterruptedly possessed for a certain period become the property of the possessor." (Ancient Law, 280).

Brocher declares:

"Prescription is as much a necessity to society as is inheritance to a family. We cannot conceive of the second without the first. Without such a sanction, nothing would be secure." (Droit Int. Priv., 321.)

Domat:

"The use of prescription is wholly natural in the state and condition we are in. * * *

The same reason which makes that long possession acquires the property and strips the ancient proprietor, makes likewise that all sorts of rights and acquisitions are acquired and lost by the effect of time. Thus a creditor who has omitted to demand what is due to him within the time regulated by law, has lost his debt and the debtor is discharged from it. * * * And, in general, *all sorts of pretensions and rights of all kinds whatsoever are acquired and lost by prescription*, unless they be such as the laws have particularly excepted. Thus we have two effects of prescription, or rather two sorts of prescription. One which acquires to the possessor the property of what he possesses, and which divests the proprietor of his right because of his not possessing: and the other by which all other kinds of rights are acquired or lost; whether there be any possession of them—as in the case of the enjoyment of a service, or whether there be no possession of them at all—*as in the loss of a debt* for not demanding it.

All sorts of prescription by which rights are acquired or lost are grounded upon this presumption, that he who enjoys a right is supposed to have some just title to it, without which he had not been suffered to enjoy it so long; that he who ceases to exercise a right has been divested of it for some just cause; *and that he who has tarried so long a time without demanding his debt, has either received payment of it, or been convinced that nothing was due him.*

We must distinguish two sorts of rules relating to prescription. Those which concern the different manners in which the laws have regulated the times of prescribing, and those which respect the nature of prescriptions. * * *. These are the natural rules of equity, but those which make the time of prescription only arbitrary laws. For nature does not fix what time is necessary for prescribing." (Civil and Public Law, Strahan's Ed. (1732) 483-4.)

Burke:

"If it were permitted to argue with power, might not one ask these gentlemen whether it would not be more natural, instead of wantonly mooting

these questions concerning their property, as if it were an exercise in law, to found it on the solid rock of prescription—the soundest, the most general, the most recognized title between man and man that is known in municipal or in *public* jurisprudence; a title in which not arbitrary institutions, but the eternal order of things gives judgment; a title which is not the creature but the master of positive law; a title which, though not fixed in its term, is rooted in its principles in the law of nature itself, and is indeed the original ground of all known property; for all property in soil will always be traced back to that source, and will rest there. * * * These gentlemen know as well as I that in England we have always had a prescription or limitation, *as all nations have against each other.*" (Letter to Son: Works, vol. 6, p. 412. See also speech on English Constitution, vol. 7, p. 94.)

We add expressions on the subject from two of the great Departments of the United States Government, that of State and that of Justice. Mr. Bayard, Secretary of State, in a note to Mr. Muruaga, December 3, 1886, said:

"The same presumption may be almost as strongly drawn from the delay in making application to this Department for redress. Time, said a great modern jurist, following therein a still greater ancient moralist, while he carries in one hand a scythe by which he mows down vouchers by which unjust claims can be disproved, carries in the other hand an hour-glass which determines the period after which, for the sake of peace and in conformity with sound political philosophy, no claims whatever are permitted to be pressed. *The rule is sound in morals as well as in law.*" (Wharton, Int. L., Appendix, vol. iii. See Crallé *infra.*)

The government of the United States was indebted to Reside upon a judgment. The Secretary of the Treasury in 1858 undertook to withhold a part of it, because of an alleged indebtedness of Reside to the government of twenty-three years' standing. The question of his right to do so was referred to Attorney-General Black, and the following is a part of his answer to the President under date July 21, 1858:

"It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason as well as law that when a party has lain by with a claim until the evidence concerning it has ceased to exist, and then produces it, the other party is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved, and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh.

I admit that the statute of limitations cannot be pleaded against the Government as a technical bar. I do not speak of that conclusive *legal* presumption which would be created in six years against an individual: but the Government is bound, like anybody else, by the rules of evidence and by the *natural* presumptions arising from the facts of the case. In some countries there are no statutes of limitations; in all countries there are large classes of cases to which such statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied, and such lapse of time proves that fact as fully as if it had been attested by credible witnesses.

The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred.

* * * When time testifies against the sovereign it is heard with as much respect as any other witness would be."

This is to be read in the light of the principles recognized in the case of The United States *v.* R.R. Co., 118 U. S., 120, with which, it is believed, properly considered, it does not conflict.

It is pertinent to note, in this connection, that the late Dr. Wharton, quoting Mr. Crallé, formerly Assistant Secretary of State, in the first edition of his Digest of International Law (1886), issued from the United States State Department, employed this language (§ 239):

"There is no statute of limitation as to international claims, nor is there any presumption of payment or settlement from the lapse of twenty years. Governments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity, of sound morals, requires it to be paid."

While in his second edition, issued therefrom a year after, are found these remarks (Appendix to 3d vol.):

"While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitations are based. A government cannot any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence."

The opposition (perhaps as strenuous now as at any former period) to international prescription among modern writers (instance Pomeroy's Int. L., 126) seems to us to arise in good measure from confusion of terms, and to be therefore largely apparent, rather than real. In other words, the difference between the two schools, as we conceive, partly at least, "lies in the terms." Prescription is confounded with limitation; not strangely either, considering the history of the terms carrying the two ideas, the common purpose to be attained, and the consequent extent of their indiscriminate use. As the distinction is to be sharply marked in reaching a correct conclusion on the question under consideration, we briefly note that history and some distinguishing features between the two.

Under the Theodosian code, which required certain actions to be brought within a stated period after the cause of action arose, a plea that the action was begun too late was called "præscriptio" by the Roman lawyers just as it is now called by the English a plea of the statute or limitation. Title and rights by this means—enjoyment for the defined period—were secured or maintained.

Usucapio indicated ownership acquired by enjoyment through long though undefined lapse of time.

Subsequently, under Justinian's code, usucapio was dropped and præscriptio used to express both ideas; and thus the latter term has come down to us, its derivative carrying the two meanings with modifications engrafted on, in the course of the centuries. In the changes wrought prescription seems to have yielded its own meaning to that of the disused word, and found expression in some nations for its old signification in a distinct term.

Mr. Markby, from whose lectures on the Elements of Law we have freely drawn, says:

"In France and Italy whether a man claims that ownership is transferred to him by possession, or whether he defends himself on the ground that the action is brought too late, he calls it prescription.

"In Germany the acquisition of ownership by possession is called 'Ersitzung,' and the bar to the action 'Verjahrung.' We use in England the terms prescription and limitation. And inasmuch as the two things are really different it is better to have the two names. In England the word 'prescription' (as defined by Lord Coke) signifies the acquisition of title by length of time and enjoyment. This would serve as a general description of usucapio." (Elements of Law, ch. 13.)

While statutes of limitation are doubtless in good part aimed to be, as they are often alluded to as, expressions of prescription, they are, nevertheless, inaccurate expressions, because, for one thing, of their rigidity and want of adaptation to varying conditions and circumstances.

It would be a bold assertion to say they are correct embodiments of true presumptive evidence, when, for instance, in the States of this Union the statutory periods within which actions of ejectment may be brought range all the way from five to forty years, and those upon promissory notes from two to twenty years.

A conclusive legal "presumption," such as is said to arise under these statutes, is *not* a rule of inference, but one attaching itself to a given state of facts upon grounds of public policy. [Greenleaf, Ev., § 32.] It does not postulate the truth of the facts, except in a general sense, or the furtherance of justice in *every* instance. For example:

"It does not assume," says Greenleaf, "that all simple contract debts of six years' standing are paid, nor that every man quietly occupying land twenty years as his own has a valid title by grant; but it deems it expedient that claims, opposed by such evidence as the lapse of those periods, should not be countenanced, and that society is more benefited by a refusal to entertain such claims, than by suffering them to be made good by proof."

On the contrary prescription *is* a "rule" of inference; not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but that *something* at least has transpired which, in the *natural order*, as the Civilians say, forms a basis and demand for its operation. It is no more the creature of legislative will than is any other induction. That the lapse of time, variant according to circumstances, needed to raise a rational pre-

sumption of a past occurrence, happens to coincide in a particular case with the statutory period in that behalf, does not make prescription and statutory limitation one. They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case. While the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice. Lord Coke, as seen, thought prescription "abideth" at common law notwithstanding the "estatute."

The Supreme Court of California mark the distinction, thus:

"They [statutes of limitation] essentially differ from the civil law doctrine of prescription, as they act simply upon and defeat the remedy, while the latter defeats the right also."

And again in a later case:

"No presumption is to be raised either as to payment or otherwise from the mere lapse of the *statutory* period, any more than would naturally arise as to any other stale demand.'

And such is the generally accepted modern view.

Prescription has been denied a place in the public law because it has "no definite fixed limit" (Pomeroy, *supra*), which is very like objecting to it because it is not limitation.

As before seen, prescription was recognized when limitation was yet unknown. Bracton knew of it at common law before the English statutes on the subject. Courts of equity, where limitation acts do not apply, have invariably given lapse of time due weight in adjudications. They have always refused to enforce stale demands without undertaking to fix precise times for imparting the infirmity. Each case is left, under general principles, to be adjudged, as to time, according to its own character and circumstances. And the doctrine has been applied to the state acting for its citizens. In The United States *v.* Beebee, McCreary, J., in a suit where the

United States Government sought (in the interest of certain patentees) to recover land adversely held for a long period under color of title, held:

"Although the general rule is that statutes of limitation do not run against the state, yet when the state resorts to equity for relief it must come on the same condition with other suitors, and a stale claim by the state may be rejected for that reason, as it might when presented by an individual." (17 C. L. J., 77.)

On appeal the Supreme Court of the United States (127, U. S., 346), while disavowing imputation of *laches* to government for negligence of officers in matters of state concern, affirmed the judgment, and said:

Courts of equity "refuse to interfere to give relief where there has been negligence in prosecuting the claim, or where the lapse of time has been so long as to afford a clear presumption that the witnesses to the original transaction are dead, and the other means of proof have disappeared."

One had as well assay to bound memory, or the occurrences that constitute negligence, by exact limits of duration, as to attempt to define just what shall be time's efflux to establish true prescriptive rights. Parties, subject-matter, habits, conditions, circumstances, enter into the problem. It is one thing to forget or be able to show how one came by a farm; and another, how one came by some animal on the farm. The fact that a nation obtained a particular territory by devastating war, will be treasured in memory long after every vestige of the transactions by which the implements of war were procured shall have been obliterated, and long after the titles of its bountied soldiers shall have been lost in oblivion.

To withhold causelessly a demand for goods sold until the witnesses to the transaction and other usual means of ascertaining the facts have, in ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumptively a public register is kept for a like time after maturity, may not be. It is true, experience teaches that such and such things are apt to occur ordinarily in about such and such times, in the affairs of men; but it also recognizes the impossibility of

prescribing exact periods for the occurrences, as well as the certainty of occasional departures from the general rule.

If to-day A have a watch of B procured ten years ago, and both, in the multiplicity of their mutual dealings and exchanges, have forgotten the circumstances of such procurement, and all means of determining the true ownership are lost, whose watch does it become? A's. His title arises out of the necessity of the situation, or as Pothier says of prescription, it is founded in the ordinary course of things. If in less complex transactions a like situation should arise only at the end of twenty years, the result would then be the same. All know that continued possession by A and disregard or neglect of his property by B will ultimately so terminate. But no earthly power can prescribe just what lapse of time will be necessary to create that situation. To decree when such a condition shall be *deemed* to exist is another thing. That can be done by legislation or by treaty stipulation, and when done constitutes limitation—not prescription.

It is this prescription which underlies, varies from, antedates, and, as Phillimore says, forms the model for municipal limitation regulations, that the writers asserting the existence of the doctrine in the International Law, refer to and treat of.

On careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of opinion that by their decided weight—we might say by very necessity—prescription has a place in the international system, and is to be regarded in these adjudications.

True, but few of them make reference to individual claims or to debts by one state on account of transactions with citizens of another state. But the principles recognized are general. Founded in nature, their application is imperative and broad as human transactions. They reach to debts necessarily, as Domat shows.

If an article be paid for when bought and the money left as as pecial deposit with the purchaser, time, under the doctrine,

will run against a claim for it. *A fortiori* does it run, where the money is not segregated from, but left with the common fund of the buyer. Besides, the right to defend against, is as substantial as the right to assert a demand. Its impairment is an injury. One whose act or negligence results in such injury must be charged in justice with its consequences. The causeless withholding of a claim against a state until, in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and thereby the means of defence essentially curtailed, is in effect an impairment of the right to defend. The public law in such cases, where the facts constituting the claim are disputed and disputable, presumes a defence. But where there is valid reason for the withholding, the case is different. The presumption is referable to some fault of the claimant. Incapacity, disability, want of legal agencies, prevention by war, well-grounded fear, and the like are not faults. Abandoned or neglected property or rights only are prescriptible.

Vattel says :

"As prescription cannot be grounded on any but an absolute or lawful presumption, it has no foundation if the proprietor has not really neglected his right."

Again :

After showing that "immemorial prescription" confers an indefeasible title because it is founded upon a possession the origin of which is lost in oblivion, he adds :

"In cases of ordinary prescription the same argument cannot be used against a claimant who alleges just reasons for his silence, as the impossibility of speaking, or a well-founded fear, &c., because there is then no longer any room for a presumption that he has abandoned his right. It is not his fault if people have thought themselves authorized to form such a presumption, nor ought he to suffer in consequence. He cannot, therefore, be debarred the liberty of clearly proving his property.

It is "ordinary prescription" subject to be rebutted, with which we are especially concerned. How is one in practice to know in a given case when it arises, it may be inquired, since it has no fixed periods, and no analogies to guide one

arising from limitation acts, such as obtain in courts of equity. A definitive answer it would be difficult to frame. But in general we should say, where, all the evidence considered, it appears from long lapse of time and as a result thereof ordinarily to have been apprehended, that material facts including means of ascertainment pertaining to support or defence are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in "danger of mistaking the truth," a basis for the presumption exists. If such situation be fairly imputable to a claimant's *laches* in withholding his demand, or, in Vattel's phrase, "when by his own fault he has suffered matters to proceed to such a state that there would be danger of mistaking the truth," prescription operates and resolves such facts against him; but if not so imputable, what the finding must be becomes a question of the preponderance of testimony merely, leaving each party to the misfortune time may have wrought for him in the support or in the defence of the claim.

While prescription names and can name no particular periods, since Sir Matthew Hale's enunciation to that effect twenty years have been looked upon as about the time, in the ordinary run of affairs, required to give rise to the presumption. And the general acceptance of that time is evidence of its reasonable foundation. Still it must be said the constantly increasing multiplicity of business transactions and intercourse tends to suggest a shorter period.

In this case it is not shown when the claim was first brought to the attention of the United States; and we have not sought to ascertain, for, in the view we take, it is immaterial. Whenever so brought, it came *cum onere*. It has been held that statutes of limitation can be pleaded against the State in an action upon an assigned claim. (United States *v.* Buford, 3 Peters, 30.) The principle applies here, and continues to operate until time ceases to run against the claim, so to speak. When does it so cease to run?

It has been urged with plausibility that this occurs on the claimant invoking the aid of his government, because then

he ceases to have control of his claim. But notice to the plaintiff state is of itself no protection to the defendant state. The latter's means of defence may be dissipated while the claim lies in the archives of the former, and thus its right to defend impaired in the sense above indicated. If it be said the plaintiff state is an interested party and time should not begin to run against it till its discovery of the injury, it may be answered that where one of two states is liable to be placed at a disadvantage by the conduct of a citizen it should be that one whose citizen he is. We think the due notification to the debtor government marks the proper date. This puts that government on notice, and enables it to collect and preserve its evidence and prepare its defence.

Of course time's work of obscuration, effacement, and destruction goes constantly on under all circumstances. Time and tide wait for no man. And all, we apprehend, is meant by its failing or its ceasing to run against a claim is that in such event that work is not to be imputed to the *laches* of the claimant. Delays are therefore harmful. Honest claims and honest defences suffer by them; only dishonest ones profit. And so it is a delayed demand naturally excites criticism, even where it escapes the ban of suspicion, and the greater the delay the stronger the tendency in this direction.

In a recent case, the claim of Carlos, Butterfield & Co., of New York, against the government of Denmark, Sir Edmund Monson, the British Minister in Athens, the arbitrator under a treaty (1888) between the United States and Denmark, where it appeared that a lapse of less than six years intervened between the occurrences (1854–5) complained of (being acts of the public authorities of the island of St. Thomas in regard to claimants' ships, and of which the government at Washington had prompt notice) and the official notification of the claim to the Danish government, said, while denying the insistence of Denmark that such delay constituted a conclusive objection to the validity of the claim,

that neither claimants nor the United States government used due diligence, "*and have thereby exposed themselves to the legitimate criticism of the Danish government on their dilatory action.*"

It is said there are old claims about which there is and can be no dispute as to the facts. It is enough to say as to such, that the present holding does not stand in their way. The statement of Mr. Crallé, acting Secretary of State, to which our attention has been directed, namely: "Governments are presumed to be always ready to do justice; and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity and of sound morals requires that it should be paid," may not in itself perhaps be opposed to prescription. Conceded that a claim "is well founded," there would seem to be no occasion for prescriptive or other evidence in regard to it. The objection to the remark, in the connection in which it was employed, is, that it assumed the truth of the matter in controversy, to wit: the validity of the claim, for the ascertainment of which the principle was invoked. As to any admitted or indisputable fact, the public law, not resting "upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality," we are inclined to think, would not oppose the lapse of time, except for the protection of intervening rights, should there be such, even where municipal prescription might.

The contention urged with force, we should have before observed, that the plaintiff government conclusively adjudges the question of *laches* on the part of claimants as against the defendant government is not, we think, tenable. It is only another form of denying prescription. If both governments are not bound by the principle, it is not the law. If it be the law, as we hold, neither can determine the occasion of its application for the other. By the same title the United States decides a claim is not, Venezuela may

declare it is, barred. Of course, in their diplomatic discussions each government must determine the law for itself.

And the decisions of each, we may remark on the other hand, on such questions are entitled to high respect. Such decisions are not to be taken, as has been suggested, as persuasive arguments in support of or against claims, in the ordinary acceptation. The state or foreign affairs department of a government always commands the services of the most learned, able, and experienced statesmen and jurisconsults the country affords. From every consideration affecting it, its purpose must always be to conform its decisions to the public law in international matters. It is, of course, apparent that such decisions are sometimes not the law, since they are occasionally in conflict as between two countries. They are nevertheless one of its important sources.

In some of the cases argued long periods have intervened after due notifications of claims by the United States government to that of Venezuela, in which no official mention of them is made by either government. It is urged that such lapses should, on general principles, be held to operate peculiarly against claimants. Though the question is not involved in this case, we have considered it, and have thought it worth while here to say we are unable to find authority or a satisfactory footing for this insistence as a general proposition. There are so many things that may induce one government not to press pending demands against another, disconnected with the demands themselves, consideration for the condition and welfare of the debtor state itself being prominent among them, that we are disposed to think the true and, so far as we are advised, the usual way is to regard time in such cases, in the absence of circumstances evincing abandonment, as no respecter of persons.

Upon these principles, too lengthily discussed, without awaiting further proof called for in defence from Venezuela, we disallow claim No. 36. It was withheld too long. The claim-

ant's verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement.

Claim of

SETH DRIGGS, for the minor heirs of Goodrich,
v.
THE UNITED STATES OF VENEZUELA. } *No.* 35.

[April 2, 1890.]

ANDRADE, for the Commission:

The papers in this case consist: 1. Of a petition in which Seth Driggs states that Benjamin Goodrich, a citizen of the United States of America, was established in business at Carúpano, Venezuela, in the month of September, 1835, when said place was taken and ransacked by the revolutionary troops under the direction of Commandant Pedro Carujo; that Goodrich's store having been entered by the same troops, was plundered of all its contents; that, thereby, Goodrich lost all he possessed (about six hundred dollars in goods of his own, besides his personal effects), and having been reduced to extreme poverty, at last died miserably at La Guayra; that all the misfortunes of Goodrich were attributable solely to the outrage of which he had been made a victim at Carúpano by soldiers wearing the national uniform of Venezuela; and he (Driggs) therefore claimed in behalf of three grandchildren, minors, named Daniel, Lucy, and Adell Dibble, that Goodrich had left in orphanage, absolutely destitute of fortune, the moderate sum of six thousand pesos as a just compensation for the losses that their grandfather had suffered. 2. Of an affidavit served before the United States Legation at Caracas on the 23d of April, 1868, in which said Driggs declares that he had intimately known Benjamin Goodrich, with whom he had kept up commercial relations; that he had been at Goodrich's establishment at Carúpano one week before the above-mentioned outrage was committed; that he was acquainted with said fact, and

considered the sum of six thousand pesos as a poor remuneration for the damage Goodrich had thereby sustained; and that Daniel, Lucy, and Adell Dibble were the only surviving heirs of the said Goodrich.

There is no evidence at all in support of this claim. The petitioner himself is not a legal but a voluntary representative for the so-called minor heirs of Goodrich. Therefore we disallow it.

Claim of

MARGARET WATSON DE CLARK
v.
THE UNITED STATES OF VENEZUELA. } *No.* 19.

[April 2, 1890.]

ANDRADE, for the Commission:

It appears that Margaret Clark, of the city of Baltimore, widow of Captain John Clark, who spent a considerable portion of his life and in 1847 died in the naval service of Venezuela, had been "conceded" a pension of $20 per month by that government on account of such service. This pension was regularly paid up to May 31, 1856, to her, and thereafter to March 1, 1858, to her authorized agent, one Seth Driggs, to wit: $419.40 in *cinco billetes de deuda antigua de Tesoreria sin interés*, which he claimed to have lost. She died in said city November 4, 1863. The petition here was filed before the former Commission by said Driggs on behalf of her heirs-at-law, citizens of the United States, claiming the pension from May 31, 1856, till her death, with interest. There is no evidence before us that this claim was ever presented to the government of the United States or to its legation at Caracas beyond the fact of its consideration by the former Commissioners and umpire; nor is there any evidence submitted touching the merits of the claim.

The claim is not such as the treaty contemplates, and must be disallowed on that ground (see No. 12), even if there were no lack of evidence, and no difficulty about due presentation.

Claim of

ANN EULOGIA GARCIA CADIZ, now known as LORETTA G. BARBERIE, *v.* THE UNITED STATES OF VENEZUELA. } *No.* 47.

[April 2, 1890.]

FINDLAY, for the Commission:

At the threshold of this case there is a jurisdictional question which might give rise to serious difficulty if the claim was well founded in other respects. By the terms of the Treaty we are only at liberty to pass upon such claims as were presented to the Government of the United States or to its Legation at Caracas *before* the first day of August, 1868. The papers in this case were submitted by the Legation to the old Commission *on* the 1st of August, 1868, but there is no positive proof that they had been presented to the Legation prior to that date, and by the strict terms of the language above quoted would be excluded. It appears, however, that they were mailed from New York on the 22d of June, 1868, to D. M. Talmage, the Commissioner of the United States, then engaged in the discharge of his official duty at Caracas, and in due course ought to have reached him in time to have been filed with the Legation before the first of the following August. Had they been transmitted to the Legation instead of Mr. Talmage we might have been willing to presume that they were received in time to come within the terms of the present submission; but, sent as they were, there is no presumption to be made in favor of their timely receipt. The question, however, is not a very im-

portant one, because on examining the papers and proofs submitted, we must reject the claim upon other grounds which go to its merits. The petition alleges that José Felix Garcia Cadiz was a citizen of the United States, and that he acted as agent for an agent of the Government of Venezuela to purchase arms for her forces then engaged in the war for independence, and that in the performance of this service he was caused to suffer a pecuniary loss which is variously stated, and in such a loose and unsatisfactory manner that we can neither discern the precise nature of his injury nor the extent of his losses. The contract under which it is claimed he was acting is not among the papers, nor do they supply the evidence by which we can ascertain its terms. It appears, however, to adopt the language of the petition, "that during the years 1810, 1811, 1812, *and thereabouts*, the said Cadiz was the agent of the Venezuelan Government in the United States, acting by request and under the direction of Don Juan Vicente Bolivar, then agent of Venezuela in the United States of America, and as such purchased arms, in the *neighborhood* of five thousand muskets, for the Venezuelan Government, at twelve (12) dollars each, for which he was obliged to pay in part, and on which he advanced considerable of his own money, and for which the said Bolivar as agent for the said Venezuelan Government agreed that he should be paid."

Reference is then made to a petition of his brother, Don Ramon Garcia, dated July 28, 1811, and the papers thereto annexed, as supplying the evidence which supports the averments of fact as above quoted. An examination of these papers shows that they consist of a letter addressed to someone as "Most Puissant Sir," and who, from the context, would appear to have been a person in high authority in Venezuela, particularly as the writer expects a great deal from the equity of this individual, whom, in the closing paragraph, he styles "Your Highness." This letter is dated "Caracas, *July* 28, 1811," and, although apparently written

by Don Ramon Garcia, is not signed by anybody. This is the foundation of the claim, and rests, therefore, upon an unsigned letter addressed to nobody. The claim, in fact, like an air-plant, seems to draw sustenance from every source except its roots. On examining it, however, we find that the case made does not accord fully with the facts as alleged in the petition. The case as presented by the letter represents Joseph Cadiz as being exposed to an action by the manufacturers for breach of contract, and as certain to suffer in credit by the failure of Venezuela to take all the muskets ordered; besides suffering a direct pecuniary loss by the advance of $3,000 on account of muskets, and the payment of as much more on account of Bolivar, who had agreed to advance it, but failed.

There is no mention made of any loss suffered by the claimant in consequence of the difference between the price paid for the muskets and the proceeds of the sales of coffee for which they were bartered.

Appended to this letter, however, is a statement of account, under date of *July* 12, 1823, purporting to have been made by Joseph Cadiz, and which is entitled "A statement of the debt and its interests of Don Juan Vicente Bolivar, Agent of Venezuela in the United States of America, during the year 1811." In this account Cadiz charges for $10,851, with eleven years' interest on the same, $6,161, as a sum of money due him on 3,617 muskets at $12.50 apiece, explaining the item as follows: "These muskets were bartered for coffee at the rate of 100 lbs. of coffee for each musket; and, the coffee having been sold in Philadelphia at $9 per 100 lbs. to meet the manufacturers' claims," &c., there was a difference as above stated against the accountant of the principal sum of $10,851.

Here then is a claimant who, through his brother and agent in 1811, is alleged to have complained to some anonymous body in Venezuela that he had been injured by the refusal of the agent of that government in the United States to carry

out a contract with respect to the purchase of muskets, and yet who fails to mention what in eleven years afterwards, according to an account then made up by him, becomes one of the principal items of his loss. Not only so, but the claimant himself, in making up this account, does it so loosely that he makes an error of $1,808.50 in the 3,617 muskets item, charging for them $43,404, at $12.50 per musket, which at that rate would yield $45,212.50. It is true this error is against him, but as an evidence of the looseness with which the account is stated it matters not on which side of the column it occurs. A man with a *bona fide* claim and a reasonable expectation of having it paid does not usually fall into such errors. There is another thing to be noticed in connection with this account. The lot of 583 muskets complete with bayonets is mentioned as having been "taken along with him"—that is, Bolivar. The other lot of 3,617 is called "the remainder received from the manufacturers," and would appear to have been paid for in coffee, which fell short of the agreed price by $10,851. Were these muskets received by Venezuela or not? The letter of Don Ramon Garcia before referred to, under date of July 28, 1811, and which constitutes the first presentation of the claimant's case, in its general tenor would seem to very pointedly indicate that the 5,000 muskets bargained for in some way by Cadiz and Bolivar had not been delivered. The language of Don Ramon is as follows: "But on asking of the above-mentioned agent, Don Juan Vicente Bolivar, the amount which was to be paid as first instalment, the agent refused to pay it, and Don José Felix (meaning Cadiz) was left to pay the debt" (that is, as we understood it, the first instalment). The writer then goes on to say: "And as about that time Don Telesforo Orea succeeded Mr. Bolivar in the agency and authority of the same, when the time for the fulfilment of the contract for the 5,000 muskets was up Don José Felix (that is, Cadiz) called on Bolivar, who told him to see Orea about the matter. He did so, but Orea sent him back to Bolivar; *therefore* (italics

ours) the brother of the undersigned (although, as we have before stated, the letter is signed by nobody) is greatly exposed to be ruined *if, as it seems natural, the manufacturers sue him and take possession of his goods*" (italics again ours).

From this statement it would appear that the muskets were not delivered, and that what excited the fraternal solicitude of Don Ramon was the fear that his brother would be sued for a breach of contract. Besides it may be accepted as a fact which requires no proof that the manufacturers would not have parted with their property until they were either paid or secured. But, again, the letter goes on to say "the undersigned cannot forbear regretting, in the first place, the detriment caused to this province and its confederates *by not having secured* the considerable number of arms which were bargained at such a good price, considering that the Government of the United States pay fifty cents more for each musket." If this language has any significance at all, it can only mean that Don Ramon, in 1811, in the possession of letters recently received, as he states, in this same letter before quoted, from his brother in the United States, complaining of the course of Bolivar, understood the cause of grievance to be that the claimant had made a bargain for muskets, which he was not able to fulfil, and that his liability to a suit for breach of contract, together with certain money he had advanced in part payment for the muskets, constituted his claim. In 1823 the claimant, as we have shown, appears to have enlarged his claim, and it then appears as if the muskets had been delivered, but he failed to realize in full what was agreed to be paid for them, by reason of the coffee which was taken in exchange not bringing as much per pound as had been anticipated.

There is not the slightest evidence in the papers that this anonymous letter and this account, neither of them sworn to, and constituting the grounds of claim, were ever presented by anybody to anybody. There is a minute at the bottom

of the letter, also unsigned, which reads as follows: "The executive power ordered Don Telesforo Orea to fulfil the contract, provided that its terms were not very unreasonble. This was substantially the decision, and the order was sent to him thereupon." From this it would appear, however, that the contract had not been fulfilled, and the muskets not delivered, and the relief desired and obtained by the claimant was the escape from liability for a breach of the contract.

The claimant appears to have left the United States shortly after these occurrences and taken up his abode in different parts of South America, not returning, however, to Venezuela. He finally settled in Santiago de Chile, from which place it would seem from an endorsement on the account before mentioned, he communicated with his brother Don Ramon, then in Caracas, concerning his claim. He accordingly sent this account together with all the papers in his case to this brother, with full power of attorney under date of the 3d of May, 1823, to collect and receive "all the amounts due to him *in the Republic of Colombia*, and specially that he may demand and collect the amount specified in the documents attached to this power of attorney." What was done with the claim, and under this power appears from the affidavit of the present claimant, a daughter of Mr. Cadiz, made in New York on February 28, 1890, in which she says, "that according to deponent's best knowledge, information, and belief, the family of Ramon, from 1823 to about 1866, all of which time they had charge and possession of the papers on which this claim is founded, never collected nor received anything on account of the claim in question, and *never endeavored or undertook to collect the said claim*." * * * So it slumbered for more than forty years, until the papers were sent to Mr. Talmage in the summer of 1868 as before described, and having been disallowed by the Commission of which he was a member, because it "was not filed with the United States Legation previous to the organization of the

Commission," it now comes before us, after the lapse of nearly eighty years from the origin of the claim. Both the original claimant and his brother Ramon, to whom the power of attorney was given, appear to have died in 1823, but while the power was thus revoked, there is no reason why the parties interested should not have presented the claim, either in the tribunals of Venezuela, or through the good offices of the United States, and not having done so, when the circumstances in which it originated were comparatively recent, not even *endeavoring* or *undertaking* to collect it, but sleeping on their rights for nearly a half century, we are of opinion that the consideration of such a case, even if we could ascertain with reasonable certainty what it was, would do violence to every principle of sound policy and open the door for the admission of any claim, however stale and obscure. It is true that this Commission is an international tribunal and in some sense is not fettered by the narrow rules and the strict procedures obtaining in municipal courts, but there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice. Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence, by which the equality of the parties is disturbed or destroyed, and, as a consequence, renders the accomplishment of exact or even approximate justice impossible. Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal in dealing with it cannot escape the obligation of an universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed. The Treaty under which it is sitting re-

quires that its decisions shall be made in conformity with justice, without defining what is meant by that term. We are clearly of the opinion, that in no sense in which the term is used, would it be just for us to make an award which would require the levying of a tax on the whole present population of Venezuela to pay a claim which originated before nearly all of the oldest of them were born, and which is presented at a time when it is impossible to say whether it is well founded or not, the delay being without excuse or justification, and we accordingly reject the claim and dismiss the petition.

Claim of

RICHARD O'DWYER
v.
THE UNITED STATES OF VENEZUELA. } *No.* 33.

[April 2, 1890.]

FINDLAY, for the Commission:

There are no papers in this case except the following:

1. A letter from the claimant to the Hon. W. H. Seward, dated the Albany County Lunatic Asylum, February 27, 1868.

2. A certificate of the intention of the claimant to become a citizen of the United States, which said intention was declared on the 6th day of February, 1824, and is certified to under date of the 26th of February, 1868.

3. A certificate of the naturalization of the claimant on the 28th of February, 1868.

4. An affidavit which purports to have been made by the claimant on October 9, 1867, before one P. W. Murphy, who signs himself commissioner of deeds for the city of Albany, but without any further authentication of his official character.

The ground of the claim is that Mr. O'Dwyer, by his prompt advice tendered to General Paez at a critical moment in the battle of Carabobo, saved the fortunes of the day, and enabled Venezuela to establish her independence. This is the kind of deed that usually calls for a monument or some other testimonial of national gratitude; but as mere dispensers of justice we must disallow the claim and dismiss the petition.

Claim of

ELIZABETH B. SCOTT
v.
THE UNITED STATES OF VENEZUELA. } *No.* 12.

LITTLE, for the Commission:

The *expediente* sets forth in substance—

That in 1812 Alexander Scott, a citizen of the United States, residing in Washington, having been appointed a political agent by President Madison to proceed to Venezuela, then at war with Spain for independence, to look after the commercial and other interests of the United States in that quarter, delayed his departure from some time in March till late in May, in order to secure the aid of his country toward relieving the distress and suffering of the people of Caracas and vicinity, caused by the then recent disastrous earthquake in that part of South America; that he "obtained its consent and authority for purchasing and transporting" fifty thousand dollars' worth of provisions "to the city of Caracas for the relief and sustenance of the suffering inhabitants;" that the provisions (which arrived in June and July) were gratefully received by Venezuela "with many flattering demonstrations of respect and gratitude toward" Mr. Scott; that owing to heavy personal expenses incurred during and in consequence of this service (which continued

till January, 1813) he was reduced from affluence to straitened circumstances. He died in 1839. Elizabeth B. Scott, his widow, who had accompanied him and shared the labor and privations of the undertaking, in 1855 sent her memorial, embodying these statements substantially, to the Venezuelan government, through the American legation at Caracas, asking, to use her own language, "at the hands of a high-minded and honorable country such a return of reciprocal kindness as they may think fit to bestow in view of the sacrifices made."

No sum was named either of the expenses or losses incurred, or of indemnity desired. Afterwards letters from time to time were forwarded in her behalf through said legation to that government, in one of which $25,000 were suggested as a proper sum to be paid for the services rendered. The letters, while depicting in strong colors the great benefits to Venezuela of Mr. Scott's mission, and the needs of the petitioner, claimed as a consequence from his sacrifices for that country, disclose no new material fact.

This claim was presented to the former commission by the American minister at Caracas May 14, 1868. That was the first time the United States government or its agency took or was asked to take cognizance of it further than to forward matter as above stated.

To "this claim," Venezuela by her counsel demurs "upon the ground that it is based entirely on the supposed right to an exercise of gratitude by Venezuela; and does not allege any breach of contract or wrong cognizable by a tribunal of justice—this without admitting the claim of special gratitude."

As we understand it, a "claim" within the meaning of the treaty implies a *right* on the one hand and an *obligation* on the other. It has reference to some alleged wrongful conduct of the government upon which it is made. That conduct may

have been active or passive; the government may have done what it ought not to have done, or refused or neglected to do what it ought to have done in respect to the subject-matter of the claim. And injury or damage must be alleged to have resulted from that conduct to the claimant under circumstances giving him the right under the treaty through his own government to demand, and imposing on the delinquent government the obligation to allow, indemnity therefor.

This claim is not of that character. No wrongful conduct is or can be imputed to Venezuela in respect to its subject-matter. All she did was thankfully to receive a gift of provisions sent by the government of the United States to her people in distress. The claim, if otherwise good on the face of the papers, would be obnoxious to an objection for delay in presentation for reasons stated in No. 36. The demurrer will be sustained and the case dismissed.

It may be worth while to add a few facts about this case obtained from the public records. Having been commissioned in 1811 to go to Venezuela as agent for the Government of the United States, Mr. Scott started in March, 1812, and got as far as Baltimore, where he found there were no vessels going to Venezuela because of the then recent embargo. While thus detained in Baltimore, Congress passed the act of May 8, 1812, "for the relief of citizens of Venezuela," authorizing the President to purchase $50,000 worth of provisions and "to tender the same in the name of the Government of the United States to that of Venezuela for the relief of the citizens who have suffered by the late earthquake." He was directed by President Madison to proceed to that country in one of the vessels carrying the provisions and aid in their distribution. He was paid by the United States, as its agent, for his services, including $700 paid him while detained in Baltimore, $4,115, and thereafter employed in its service.

Claim of

ALBINO ABBIATTI
v.
THE UNITED STATES OF VENEZUELA. } *No.* 34.

CITIZENSHIP.

LITTLE, for the Commission:

This claim is based upon three causes of complaint against the Venezuelan government:

1. For refusal to pay balance of salary due him as "Musical Director" of the bands of music of Caracas, in 1863, $700.

2. For alleged unlawful arrest and incarceration "in a dirty, filthy prison, for several hours," in Caracas, for failure to have his bands of music ready to play on one hour's notice "at an ecclesiastical procession," in 1863, $20,000.

3. For non-fulfilment of a contract between himself and the Secretary of State in the Department of War and Navy whereby he was "to take charge and control of the military bands of music at Caracas," &c. The contract was made, as alleged, in 1863, and its breach occurred in 1864. He claims, as of 1868, $33,600, interest and all, $24,000 of which, he says, would have been "actual profits." There is no evidence that the claimant was ever a citizen of the United States, save the declaration in his petition "that he *is* (February 5, 1868—time of verification) a citizen of the United States of America." It does appear, however, that, during the years 1863, 1864, and afterwards, he was a subject of His Majesty the King of Italy. If he ever took steps to become a citizen of the United States, it was, perhaps, for the purpose of claiming under the treaty of 1866.

Has the claimant then, not having been a citizen of the United States at the time of the occurrences complained of, a standing here? The question is a jurisdictional one. The

treaty provides: "All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the government of Venezuela * * * shall be submitted to a new Commission," &c. Citizens when? In claims like this they must have been citizens at least when the claims arose. Such is the settled doctrine. The plaintiff state is not a claim agent. As observed elsewhere, the infliction of a wrong upon a state's own citizen is an injury to it, and in securing redress it acts in discharge of its own obligations and, in a sense, in its own interest. This is the key—subject of course to treaty terms—for the determination of such jurisdictional questions: Was the plaintiff state injured? It was not, where the person wronged was at the time a citizen of another state, although afterwards becoming its own citizen. The injury there was to the other state. Naturalization transfers allegiance, but not existing state obligations. Abbiatti could not impose upon the United States, by becoming its citizen, Italy's existing duty towards him. This is not a case of uncompleted wrong at the time of citizenship, or of one continuous in its nature.

The Commission has no jurisdiction of the claim for want of required citizenship, and it is therefore dismissed.

Claim of

JOHN CORTÉS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 42.

Commission:

This claim is for $304.99, being for "a package of Venezuela currency for which the Republic of Venezuela is liable," to quote the words of the claimant. The petition does not state just how the indebtedness arose, or when; but it may

perhaps be inferred, from some language employed, that it is the currency of some bank which the government of Venezuela is under obligations, in the opinion of claimant, to redeem.

There is no averment that he is, or ever was, a citizen of the United States, aside from the transmitting letter of Mr. Stillwell, dated May 11, 1868, which states he is such citizen.

The claim is not supported by evidence, either as to merits or citizenship, and is therefore dismissed.

Claim of

HEIRS OF JAMES BARNES
v.
THE UNITED STATES OF VENEZUELA. } *No.* 46.

Commission:

We learn from the letter of the commercial agent in charge of the Legation of the United States at Caracas, under date of August 1, 1868, that this claim is for $100,000, and, from the report to his government of the Venezuelan Commissioner, Oct. 3, 1868, that it was "for services of all kinds and of great importance rendered the Republic." This is all that appears on the subject from the papers transmitted us, and no evidence has been offered either as to the citizenship of the claimants—if indeed there are any, the claim transmitted being "the claim of the estate of James Barnes," without mentioning names—or as to merits. The claim is therefore dismissed.

Claim of

MORRIS KETCHUM
v.
THE UNITED STATES OF VENEZUELA. } *No.* 48.

Commission:

This claim was for $4,890 on account of money loaned, as would seem, by the claimant in New York, 1859, to General Paez. No one has appeared for it, and there is no evidence before us to sustain it. It is therefore disallowed.

Claim of

LEONARDO M. PECK
v.
THE UNITED STATES OF VENEZUELA. } *No.* 50.

Commission:

This claim, originally for $2,252, seems to rest in imagination, so far as this Commission is concerned. It comes in an empty wrapper! There is no one to represent, nor a scrap of evidence pertaining to it. It is therefore disallowed.

Claim of

CHARLES H. LOEHR
v.
THE UNITED STATES OF VENEZUELA. } *No.* 44.

LITTLE, for the Commission:

The communication of the United States Minister at Caracas sent the old Commission May 8, 1868, states in substance that—

One Dr. Hurtel, a citizen of the United States, temporarily residing and owning "certain property" at Palmarito, Venezuela (date not given), sold the property to one Kingan, who soon after, on sending an agent to that place, found the government of Venezuela had, before his purchase "*or* the arrival of his agent at Palmarito," appropriated the property to its own use; that K., in 1865, filed proofs with said government in the premises, and shortly afterwards sold and assigned his claim to the present claimant, whose demand upon Venezuela is set down at $9,020.57.

Supposing such to be the facts (and there is nothing offered in addition, the government of Venezuela disavowing any knowledge of the claim), there is no case here.

1. It is not claimed that the appropriation occurred under Hurtel's ownership. It may have been—probably was—under Kingan's, for he made demand for indemnity. But he is not claimed to have been a citizen of the United States at the time, or ever; presumably he was not. His claim, therefore, not falling within the cognizance of the United States originally, cannot be brought so by assignment. Loehr took only the rights of Kingan. Supposing him (L.) to be a citizen of the United States (we take it he was the former consul), he as such was not injured, and has no standing under the treaty here. (See Case 34.)

2. The character or value of the property taken is not disclosed. It is not even charged that compensation has been denied. Presumptively the appropriation was in pursuance of law, and proper remuneration to the owner in due course, in the absence of a contrary showing, will be assumed. The claim is disallowed.

Claim of

MA. ANA P. DE JOVE and MARIANA J. DE DAVIS *v.* THE UNITED STATES OF VENEZUELA.	*No.* 37.

Commission:

The claimants are the widow and daughter of Lorenzo Jove, deceased. They aver that, in 1865, the Venezuelan army injured the farm of the deceased, who died in 1866 near Puerto Cabello, Venezuela, and received from him supplies never paid for; and that, by reason of the premises, there is due them the sum of $43,139.25. They do not claim to be, or ever to have been, citizens of the United States, although they aver deceased to have been, but when is not stated.

There is no evidence to support the claim, nor on the question of citizenship. The claim is therefore dismissed.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 31.

[April 9, 1890.]

ANDRADE, for the Commission:

Seth Driggs files directly before the Commission sitting at Caracas under the Convention of the 25th of April, 1866, between the United States and Venezuela, a petition in which he complains of violation of law, abuse of authority, and denial of justice committed against him by one of the tribunals of the Federal District (Caracas), and asks the sum of twenty-five thousand dollars as compensation for the injury he has suffered.

This claim had previously been presented in December, 1867, to the U. S. Legation at Caracas, which, as it seems, took no action respecting it. Before this Commission, it is not represented.

From the judicial proceedings to which said Driggs refers in his original petition, it appears that the facts on which he founds the claim did not happen exactly as he states them. What he calls his dwelling in Caracas, *esquina del Conde*, because of the unlawful entering of which he complains, was the commercial establishment of a certain Miss Fanny Tourrell, not claiming to be a citizen of the United States; and the appearing of the judge in said establishment was in performance of his official duties. Lastly, Driggs' imprisonment was not, so far as is shown, unlawful.

Regarding the action prosecuted by the claimant against Miss Tourrell and Francisco Maria Villarroel, in respect of which he complains of the court, he obtained, so far as appears, justice and has no just ground of complaint. It is

proper to add that even if, in our opinion, the judgments complained of were not what they should have been, Mr. Driggs should have sought their correction in the proper reviewing court of Venezuela, as he could have done. Not having done so, or sought redress of any kind in that government, he stands bound by these judgments, there being no showing of the want of jurisdiction or of illegality. The Commission does not find this claim in any way justified, and, therefore, disallows it.

Claim of

PAUL BETTIKER,
v.
THE UNITED STATES OF VENEZUELA. } *No.* 6.

[April 9, 1890.]

LITTLE, for the Commission:

This claim is for a balance of $7,050 and interest on account of alleged services rendered by Paul Bettiker, claiming (in 1845) to be a citizen of the United States, as lieutenant in the Venezuelan army for a period of "upwards of four years" from 1818 to 1822. There seems to be no record evidence of this service in the Venezuelan archives; and the claimant, as is stated, lost his papers pertaining to it in a shipwreck in 1839. He made application for the first time to the Venezuelan Government for this balance in 1845. He was then informed by the Secretary of War and Marine that, while the Republic of Colombia had made arrangements to liquidate and pay for services in the Patriot army, still if he would prove the time he entered the service of the Republic, the length of his service, his grade, and the motive of his separation—"data that are not found in the office of the Secretary"—the account would be adjusted so far as

Venezuela was concerned. He seems to have failed to make the showing. The government itself on investigation procured evidence to the effect that he had served in the Colombian army, and participated valiantly in several engagements, but how long he served, why or when he quit the army, or whether he was paid, the evidence does not disclose. There is no sufficient reason given for the long delay in presenting his claim. By reason of that delay the Government, though manifestly striving in good faith to obtain them, was unable to procure the necessary data upon which to base a settlement.

2. There are indications in the papers that at the time of his services, and for years afterwards, he was not a citizen of the United States, but a British subject. These are strengthened by his memorial to the Venezuelan authorities in 1845. In it he says he is "*now* a citizen of the United States," and relates that in his passage from Liverpool to the United States about six years before, his vessel, the *Lochwood*, was wrecked, "and about fifty passengers lost their lives; that in this disaster he himself lost all his clothes, papers, books, and indeed everything he had on board, amongst which was his commission as lieutenant, and other valuable papers." He was then probably on his voyage to his newly-chosen home. There is no evidence that prior to 1839 he was a citizen of the United States. This case bears the impress of honesty, and it has evidently been regarded in that light by the Venezuelan authorities; but its infirmities we have no power to cure. It fails in the proof, and for want of required citizenship. (See cases Nos. 36 and 34.) There might be other considerations in its way, but it is unnecessary to discuss them. The claim is disallowed.

Claim of

LORENZO H. FINN
v.
THE UNITED STATES OF VENEZUELA. } *No.* 24.

[July 10, 1890.]

ANDRADE, for the Commission :

This claim is for $17,542 in Venezuelan currency, value of merchandises, cattle, and money furnished by Doctor Buenaventura Soto, in 1859, to the Federal army under the command of General Francisco Linares Alcántara.

Doctor Buenaventura Soto was a citizen of Venezuela. Lorenzo H. Finn, his brother-in-law, represented him as attorney, a circumstance which does not suffice to give his claim the nature of one of a citizen of the United States. He alleges himself to be also a partner of Doctor Soto ; but of such fact there is no sufficient evidence.

This case, on call of the docket, was submitted some time ago, and a conclusion reached as indicated ; but as counsel for the claimant was not aware of the submission, the case was held for argument. Argument being heard, we are only confirmed in the conclusion then reached. It now transpires that the property was taken in the cause of insurrection against the constituted authorities of Venezuela.

If Finn was partner, *non constat*, he had any equitable interest in the firm assets as between the partners. If the claimant does not tell us what his interest was, or whether he really and equitably had any, how does he expect us to ascertain ? Are we to guess at it ? We think not. The claim to be allowed ought to be fairly made out to satisfy the conscience of its rightfulness and extent.

The evidence, besides, plainly shows by a preponderance that the property was Soto's. There is only, we may say, the claimant's petition before the former Commission which

asserts part ownership of the property taken in him, and that is not evidence. The declaration that he was Soto's partner generally does not signify that he had an interest in this particular property. Even if the evidence was to the effect that he was partner with respect to this property, we should want to know to what extent he was partner—whether he owned the half, the fourth, the tenth, or what proportion. A partner's interest as between the partners depends upon the state of their accounts on settlement.

To allow claims of this character as for a moiety in the absence of proof, would open the door to fraud and the bringing in of claims actually in the interest of persons not entitled under the treaty in the name of citizens of the United States. If it were of a character that proof could not have been reasonably had on this point, it might be different. But we see no good reason for its absence here.

There is still another objection to this claim that could be urged with strong, if not convincing, reason against it.

In the treaty of 1803, between the United States and France, for the adjustment of claims, is this provision:

"It is the express intention of the contracting parties not to extend the benefits of the present convention to reclamations of American citizens who shall have established houses of commerce in France, England, or other countries than the United States, *in partnership with foreigners*, and who by that reason and the nature of their commerce ought to be regarded as domiciliated in the places where such houses exist."

This provision, perhaps, simply embodies the international law on this subject.

If Finn was in partnership with Soto it is believed the business took its character from the place, and was Venezuelan.

As to the partnership business, was he not domiciliated in Venezuela, and a Venezuelan?

The claim is disallowed, for these reasons, and under the doctrine of case No. 34.

Claim of

Estate of WILLIAM E. WILLET
v.
THE UNITED STATES OF VENEZUELA. } *No.* 21.

[July 10, 1890.]

FINDLAY, for the Commission:

This claim as originally presented to the Commission at Caracas in 1868, was submitted on a copy of a letter or petition addressed to the Minister of the United States accredited to Venezuela, soliciting his intervention in behalf of Clemencia Romerez de Willet. widow of William E. Willet, claiming in behalf of herself and "in representation of her minor children, Guillermo, Adriono, Neivet, Clemencia, and Dolores Willet, had in marriage with the North American citizen" the said Willet. This petition appears to have been presented to the said Minister on the 1st of March, 1864, and claimed 150,791.07 pesos for the injury inflicted upon her husband. Besides this paper Mrs. Willet, as administratrix of her husband, presented a petition to the Commission in which, without naming the amount, she prayed the allowance of such a sum as might be found to be due with interest.

She does not appear as a claimant before this Commission, having parted with her interest in the claim by the sale or the transfer of the certificates founded on the original award.

Besides the original claim, however, presented in this way, there are two secondary or derivative claims made by holders of certificates founded upon the award made by the Caracas Commission, as appears by the papers when this opinion was prepared. The first of these claims is made in behalf of Mrs. Sarah O. Allen, who claims, as the *bona fide* holder of ten certificates of award, each for $2,820, or $28,200 in all, with interest at the rate of five per cent. per annum from August 5, 1868, until paid, less $1,744 received on account

of accrued interest in the year 1871, and less also the sum of $2,256 received on the same account in the year 1876. The second claim is that of Mrs. Juliet C. Anderson, who claims, as the holder of certificate No. 318 for $2,820, with interest from July 29, 1868, to October 1, 1889, the whole claim, principal and interest, being $5,805.67, on which credits of $842.47 are allowed, showing a balance due on the date mentioned of $4,963.20. The first claimant, Mrs. Allen, appears to ground her claim on an agreement made with Mrs. Willet, by which, in consideration of an indebtedness due by her husband to the husband of Mrs. Allen, it was agreed that she should receive two-fifths of whatever sum should be awarded by the Caracas Commission on account of the original claim. The second claim is founded on the purchase by General Anderson, the father of Mrs. Anderson, of the certificate in question, for which, it is alleged, he paid full value, on the faith of the United States pledged by what is known as the finality act, that that Government would demand of Venezuela complete satisfaction of the awards made by the old Commission. The original award in this case was made by the umpire for 141,000 hard dollars, for which fifty certificates were issued for $2,820 each, running in consecutive numbers from 286 to 334 inclusive. The Commissioner for Venezuela, Señor Villafañe, was of the opinion that $30,000 would have been sufficient. The convention under which this Commission is sitting, as concluded on the 5th of December, 1885, in Article IX, provided as follows:

It is further agreed that if the Commission hereunder organized shall in whole or part annul any money awards made in any cases by the former Mixed Commission under the Convention of April 25, 1866, it shall be the duty of the Commission to examine and decide whether, under all the circumstances, and with due regard to principles of justice and equity there are any third parties who have, with the observance of due care and diligence, become possessed, prior to the date of the exchange of ratifications hereof, for a just and valuable consideration, of any portion of the certificates of award heretofore issued in said claims, and whether under the constitution or laws of either of the contracting parties, said third parties have acquired vested rights, by virtue of the awards of the former Commission under the Conven-

tion of 1866, imposing the duty on the Government of the United States to collect from Venezuela the amount or proportion of said certificates of awards which may be held and owned by third parties.

If the present Commission shall decide that there are third parties who are possessed of vested rights, then it shall examine and ascertain the sum paid by each and all of said third parties for their respective interests or shares in said awards, and shall fix the amount of their said interest in said certificates of award, or each of them, and shall issue new certificates of award for the sums so adjudged due, which shall be paid by Venezuela to the United States in the manner hereinbefore stipulated, the same as all other certificates issued by the present Commission.

Had this article been permitted to stand it would have been our duty to ascertain whether these certificate holders had come honestly into possession of the certificates on which they claim, and after determining what had been paid by each, to issue new certificates of award for the sum so ascertained. But it appears that doubts arose in respect of the true intent and meaning of this article, and to remove these doubts a supplementary convention was concluded on March 15, 1888, by which in Article 1, it was provided as follows:

It is understood and agreed that in the event of any of the awards of the Mixed Commission under the Convention of April 25, 1866, being annulled in whole or in part by the Commission authorized and created by Article II of the Treaty of December 5, 1885, no new award shall in any case be made by said Commission, to the holders of certificates of any award or awards annulled as aforesaid, in excess of the sum which may be found to be justly due to the original claimant.

Although this article is somewhat ambiguously worded, we think that its true construction forbids us from making an award in favor of any certificate holder whose certificate was issued and was accepted on the faith of an award by the old Commission, or on the faith of the finality act referred to in any case where we may consider it our duty to annul the award altogether. It is only in the event of an annulment of an award in part, that certificate holders can claim an award from us, and then only in such a sum as may be found justly due the original claimant. The theory of vested rights on which the first convention was framed

has been completely changed by this article, and certificate holders can now only claim by virtue of such an award as we think the justice of the original claim calls for; and in consequence, no new certificate can be granted to a holder of the old certificates where the old award is annulled in whole, and where it is annulled in part the allowance cannot be made in excess of what we think is justly due on the original claim. It follows from this, that in any case in which we may make an award, less than the amount originally allowed, the holders of certificates based upon the original award will have to suffer an abatement of their claims in proportion to the difference between the two awards, and in any case where the original award is annulled altogether there can necessarily be no allowance made either to the original claimant or to any holder of certificates founded upon the award, even although full value was paid on the faith that the United States would exact full payment from Venezuela, or for any other reason. The main question in this case then is, whether the original claimant, Mrs. Willet, as the representative of her husband, had a claim against the Government of that country, which it has agreed shall be adjudicated by this tribunal, and if so, what is a just allowance to be made in satisfaction of her claim. The papers in the case show that her husband was a citizen of the United States, domiciled in Venezuela. She was a native of Venezuela; was married in that country; all her children were born there, and she never appears to have been in the United States, either before or during her marriage, or since her widowhood. Nor does it appear that any of the children have changed or attempted to change their domicile of origin. Her husband, it appears, had leased a warehouse in Caracas, where he conducted a large and, it would seem, a flourishing, business in the sale of a miscellaneous assortment of goods, such as furniture, agricultural machinery, wines, provisions, et cetera. There was also a gasometer connected with the establishment, valued at some $1,500.

The upper story of the warehouse was let to a Masonic lodge, which had given a mortgage on the fixtures and furniture in the room as security for the rent, a part of which was then in arrears, the mortgage itself, however, or a copy not appearing among the papers. Venezuela at the period spoken of, was torn by factions, and on the 2d of August, 1859, on an attempt by the Federal forces to seize the capital, then in the possession of a government set up and supported by the Unionists, the warehouse of Willet, having an advantageous position for defence, was occupied by the military forces of the governing power, who first turned it into a sort of fort, and afterwards continued to occupy it as barracks until the 11th of April, 1863, destroying, consuming, or pillaging in the meantime the stock of goods and everything of value connected with the establishment, including the gasometer. Prompt application was made to the Minister of the United States for redress, but with the exception of a small sum for use and occupation and a draft for $—— on the same account, which was not paid, Venezuela appears to have refused or failed to make any allowance.

Pending these negotiations, Willet, who had returned to the United States on a visit, appears to have died in 1862, at sea, on his way back to Venezuela, intestate, and the claim was then taken up by his widow, who prepared and presented the petitions before referred to, and with the accompanying papers, had them sent to the old Commission. It appears that Mr. Culver, U. S. Minister at Venezuela, in 1864 prepared a schedule of claims of citizens of the United States against Venezuela, and sent it to the Minister of Foreign Affairs of that Government on the 1st of March of that year. A copy of this paper duly certified is before us, and among other claims scheduled is the claim of W. E. Willet for 50,000 pesos. It will be observed that the 1st of March, 1864, is the date on which Mrs. Willet sent the petition before mentioned to this same Minister, accompanied by an account in which she claimed 150,791.07 pesos. The peti-

tion of Mrs. Allen avers that this claim was sent by the U. S. Minister to the Minister of Foreign Affairs for Venezuela on the 22d of March, 1864.

It would seem from this that the statement of account of March 1, accompanying the widow's petition, either did not reach Mr. Culver on that date, or it must have been by some mistake overlooked. It is more than probable that it was not received on the day of its date, and that in the meantime the schedule of claims was made up on the 1st of March from data then in the possession of the Legation, and according to which this claim amounted to 50,000 pesos. Afterwards when the claim for 150,791.07 pesos was received, the Minister must have prepared and forwarded a second communication to the Venezuelan Government on the 22d of March. However this may be, the papers in the case show that at one time, the date of which does not appear, although it must have been prior to the 1st of March, 1864, the amount of the claim as presented to the American Legation at Caracas was only 50,000 pesos, and that subsequently this amount was increased to 150,790.07 pesos. The petition actually sent to the Commission at Caracas, we have shown, failed to specify any amount, but only prayed to be allowed whatever that tribunal might see fit to award. None of these papers are sworn to, nor is there any external evidence to substantiate the statements made in them except the following:

1. A series of interrogatories propounded by Mrs. Willet in 1864, to several witnesses, with respect to the nature and damage done by the troops to the warehouse and the stock of goods, the value of a great deal of which may be gathered from the answers made to the second of these interrogatories. This interrogatory is as follows:

"Whether the witness knows by *personal* knowledge owing to the witness having *visited* the warehouse on several occasions; that when it was occupied on the 2d of August, 1859, by the Government forces, the main storehouse and the gallery below and other rooms in the building were filled with merchandise of all classes, especially machinery for different purposes, house

furniture, matches, liquors, rifles, revolvers, wall-paper, oil paintings, engines moved by animal power and also by steam, lamps, cigars, &c. All of which represented *at sight* a *value* of more than $40,000 *without counting the cost of transportation* of the said merchandise to Mr. Willet's store or the duties thereon paid at the Custom House."

Mr. Julian Jackson answers to this interrogatory as follows:

"That it is true and he knows it, for *the reason stated in the question*, and *because* he *saw* the house before and after the occupation."

Mr. Fernando Mendes, the second witness, states in reply to the same interrogatory:

"*That it is true.* The witness remembers that there were *also* plows, wagons, wheelbarrows of several sizes, a large quantity of rails, and barrels of fine liquors and also demijohns and cases."

Pedro Regulado says:

"All that is in the question is true, and he *knows* it, because he *saw* it."

José Maria Aramburu, the fourth witness, seems to have had some appreciation of what was involved in the question and in the responsibility of making a correct reply, for while he states that he had the means of knowing, as janitor of the Masonic lodge before referred to, of what the stock of goods consisted, and after stating that the greatest part of the articles mentioned in the question were there, goes on to say that he is not "able to state the value of the stock because it would have been necessary to make an inventory," but then adds, "in my opinion the amount indicated is correct."

The second class of testimony consists of questions propounded by Mrs. Willet to eight different correspondents who appear to have known her husband and the character of the business he carried on, and the extent of his establishment, and the answers made to these questions. These interrogatories appear to have been seven in number, the second of which was the same as the one just mentioned, and the sixth was as follows:

"Whether it is true that, on or about the 2d of August, the lodge, which had been established for a long time previously in the upper part of the

house, owed Willett for rents due more than $3,000, and that, to secure the payment thereof, it had given him a mortgage upon the furniture and appurtenances of the lodge, and whether all this property, including the paper on the walls, was stolen in consequence of the forced occupation of the house, the doors of which were broken open, a value of more than $8,000, at which the furniture could be fairly estimated, having been lost in this way."

Mr. Fernando Arvelo, on the 29th of September, 1863, says in reply to the letter enclosed to him, that he

"Believes that articles and machinery stored in the building *might* be worth the amount set forth in the question and I judge so *because* of the abundance and quality of the merchandise and machinery which were in the house."

With the exception to be mentioned presently, the other replies as affording the means by which a fair estimate of the value of the property taken can be made are equally unsatisfactory, Mr. Pio Albor stating, for instance:

"For the sake of truth I will tell you that all that you ask in it (the letter addressed to him by Mrs. Willet) is true and correct, and I *know* it because I was an eye-witness of all the *acts* referred to in it."

Mr. Romulo Guardin, however, answers as follows:

"I answer the five questions propounded to me in the foregoing letter and say that everything stated therein is true and that I know it from my own personal knowledge, and as you ask me to state approximately the value of the establishment and the gasometer, I shall say that the former was worth from forty to fifty thousand dollars, and that the cost of the latter in the manufactory with all its appurtenances was fifteen hundred dollars."

On the 22d of September, 1863, Mr. Manuel Maria Fernandez answered Mrs. Willet's second question as follows:

"I was first a clerk and then the manager of that establishment, and at the time the stock consisting of the articles specified in the question was of much *more* value than that which you give to it when you say that it was worth forty thousand dollars. When I left the warehouse an inventory and valuation was made which I remember very well amounted to more than one hundred thousand dollars, and for this reason I think that on or about the 2d of August, 1869, the value of the stock was larger than you say."

To this answer there is an explanation of counsel in a note at the bottom of page 18 of the brief that

"Mrs. Willet had valued the stock at more than $40,000 *without* counting the cost of *transportation* of the said merchandise to Mr. Willet's store or the *duties* thereon paid at the Custom House."

This explanation of course was offered to reconcile the apparent discrepancy between her statement as to the value of the stock and the statement just made by the witness, but it must be observed with respect to this explanation, that Mrs. Willet at that time (22d of September, 1863) had made no statement that we have been able to discover, such as that referred to in the note. She had propounded the second interrogatory to witnesses and correspondents, asking them whether in their opinion the stock was not worth $40,000 exclusive of incidental charges for duties, transportation, &c., but she herself had not placed this valuation upon the stock except so far as it may be inferred from the character of the question itself. On the 1st of March, 1864, she places the loss of her husband at $150,791.07, but at the time her correspondent wrote this letter, there is no evidence among the papers to show that she had estimated the damages at so high a figure.

The brief (p. 19) states that—

"The foregoing correspondence was presented to the Court of First Instance of Caracas on the 26th of January, 1864, with a petition of Mrs. Willet, asking that the writers should be summoned before the court to identify their letters and to be examined in regard to their contents."

The district attorney, so the petition alleges, was notified to be present, and was present, at the examination of all the witnesses, with the exception of the eighth, and signed the record. We have no knowledge of the character of this proceeding, except what this statement discloses, and it would seem that it was instituted for the purpose of enabling the petitioner to secure the identification and verification of the letters by the persons who wrote them, and, to give additional solemnity to the inquiry, the district attorney was notified to be present, and attended. However that may be, the statements are valueless as evidence, except for the purpose of establishing the occupation of the building by the troops, and the destruction of what appeared to be a large and valuable stock of goods, with the single exception of the

statement of Manuel Maria Fernandez, who testified to the making of an inventory and a valuation of stock at the time when he left the warehouse, at which time, he says, it was worth more than $40,000, the valuation which Mrs. Willet had apparently accepted as correct.

This Fernandez appears, under the name of Castillo, to have attended at this proceeding on the 4th of February, 1864, for the purpose of verifying the statement contained in his letter.

He makes his appearance in the case again on the 27th of May, 1868, not as Castillo, however, and on that day makes oath before the Minister Resident of the United States that he was general manager and agent of the Willet establishment prior to its occupation by the troops, and that some time in July, 1859, Willet caused an inventory of all the stock to be made which was taken under the direction and control of the deponent, and that

"The sum total of the invoice amounted, as this deponent now believes, in the aggregate to one hundred and twenty thousand pesos and upwards, and as this deponent is *positive and so swears to more* than one hundred and fifteen thousand pesos, the particular amount of dollars and cents the deponent cannot state with precision and certainty for the reason that all the books of the said Willet were destroyed and stolen at the time the government took possession of the store and property of the said Willet."

On the next day before the same Minister of the United States appeared Angel Firmen Ramirez, a brother-in-law of Willet, and makes oath that he was in charge and superintendent of Willet's

"business of the said store," "and that he is satisfied and so swears that on the 2d of August, 1859, * * * the value * * * exceeded * * * one hundred thousand *pesos* and *this at first cost*, adding only insurance, transportation, and import duties."

This witness makes his appearance in the case at this date for the first time, and it will be observed that he simply swears to a matter of opinion, based upon the knowledge he acquired as the superintendent of the store. He does not like Fernandez, give the inventory taken early in July, as

the basis of his estimate. He does not even refer to this inventory, but simply swears to the value of the stock.

Although it does not appear from his affidavit when he took charge of the store, it seems that some time afterwards, in a judicial inquiry which arose as to the validity of the old Commission's work, Mr. Ramirez, who had then become a lawyer, was examined under oath on the 15th of October, 1869, and stated that he had been "agent in charge before the year 1859 of the above establishment" (meaning Willett's). He would appear to have been continuously in charge during that year and up to the date of the seizure of the warehouse, and if he was, it is difficult to assign a reason why he should not have been examined with the other witnesses in 1864, and especially why he should have failed to mention so important a piece of evidence as the inventory, when he made his affidavit in 1868. Señor Fernandez, who also testified that he was superintendent in charge down to the time he left, in July, 1859, had no difficulty in remembering this inventory (see p. 32, brief). But however this may be, there is no inventory before us, and there is no explanation satisfactorily explaining why it was not produced in 1864, or why some more accurate and reliable statement of this loss could not have been made at the time it occurred. The Minister of the United States advised Willet to make up a careful statement showing what he had in the store at the time of its occupation by the troops, with a view to presenting a claim against the government with some degree of certainty and precision. (Turpin's letter, August, 1859.) To this letter Willet replied that he could not carry the suggestion into effect for the reason that the seizure of the store was suddenly made without notice to him; that many of the goods were immediately destroyed or appropriated, and that it would be impossible to make up an accurate inventory of the contents of the store on the day of its occupation; that besides, he himself was denied access at times by the soldiers, and could not get in the building even if it were possible

to make such an inventory in the midst of all the disorder and confusion attendant upon such an occupation. There is a great deal of force in this, and while we would readily excuse the failure to make at the time such an inventory as Mr. Turpin suggested, yet we can see no reason why Mr. Willet could not have put his claim in better shape than it now appears. It is true that at that time the affairs of Venezuela were in a very disturbed, not to say chaotic, condition, one government succeeding another with startling rapidity, so much so that Mr. Willet appears to have left the country for the United States shortly after the happening of these occurrences, and where he remained until 1862. The proofs of the claim, such as they are, were prepared by his widow and not by him. He appears to have done nothing except to bring the case to the attention of the United States Legation at Caracas, although he appears to have lived some three years after the claim originated. In his letter, however, in reply to the letter of Mr. Turpin before referred to, under date of August 28, he says:

"Most fortunately, a short time previous (that is, to the occupation of the store), I had taken an account of the stock, and my letter to R. L. Allen, of New York (the father of one of the present claimants), *written* by me, and by him *received* just prior to the taking possession of the house, will prove beyond a doubt the value of the stock. I shall obtain a certified copy of the letter I refer to with all the proper formalities required to make it a valid instrument."

Now it would seem from this that he had the account of stock taken, and there is certainly no reason assigned by him, or by his widow in 1868, or by the present claimants, why the certified copy of the letter was not made, or why the original could not be produced.

It is a long while ago and in the meantime both Willet and Allan have died, and their letters have doubtless been lost or destroyed, but there is no reason that we can give that will satisfactorily explain why Willet did not procure from Allan at once the copy of the letter which he desired.

It may have been that he put it off until he made his visit to the United States, and procuring it then, it was lost owing to his death at sea. Still some one on the ship would have been likely to have taken charge of the dead man's effects, and if not, had the paper which was lost been a copy of the original, there ought not to have been any difficulty in procuring another copy from Mr. Allen who, on this hypothesis, would retain the original.

The Commission, on the whole, without carrying this discussion of the evidence any further, feel that they are very much at sea on the question as to the extent of the loss in this case, and must make up their judgment as best they can on what, for want of a better name, they may call the theory of reasonable probability. On this theory the Commission are of the opinion that claimants are not apt to make mistakes against themselves, but as a rule deduced from common, perhaps, universal experience, are more inclined to exaggerate than to underestimate their losses, and that allowing all that appears to have been claimed in the first instance in this case, either by Mr. Willet himself or his widow, as appears from the schedule of claims made up by Mr. Culver on the 1st of March, 1864, but which schedule does not show when the claim was filed with the United States Legation, no injustice can be done the claimant, and perhaps approximate justice will be done to both sides of the controversy. Before making this allowance, however, we are confronted with a question raised as to the jurisdiction of the Commission.

It has been contended with great force by the learned counsel for Venezuela that Mrs. Willet was not a citizen of the United States of North America when the claim was presented to the Caracas Commission in 1868; that her children whom she represented as guardian were not then nor are they now citizens of the United States, nor is she now a citizen of the United States.

On the contrary, it is alleged that both she and they were

citizens of the United States of Venezuela when she presented her claim in behalf of herself and for them before the old Commission, and that that status so far from being changed or impaired has been confirmed, if possible, by continuous residence in that country ever since, during which interval of time the children, then minors, have attained to full age and maturity.

It must be admitted that the law is not very clear or satisfactory upon any question of citizenship, when by that term a political and not a mere civil status is meant to be described, involving a conflict of jurisdiction between two sovereignties, each laying claim to the subject of the controversy.

Solomon appears to have been the only judge who ever reached a satisfactory solution of a somewhat analogous problem, but by a method which is not open in the settlement of international disputes. It is perfectly clear that as far as the enjoyment of any rights in the United States of America is concerned, alien women married to citizens and their offspring become citizens of the United States *ipso facto*, by the marriage itself, as fully as if they had been born or naturalized in the country.

R. S. U. S., sec. 1994.
Kelley *v.* Owen, 7 Wall., 497.
U. S. *v.* Kellar, 11 Biss., 314.
Kane *v.* McCarthy, 63 N. C., 299.
U. S. *v.* Corova, 15 Opin. A. G., 117.
Ware *v.* Wisner, 4 McCrary, 66.
Talbot *v.* Johnson, 3 Dal., 133.
Leonard *v.* Grant, 6 Saw., 609.

So the act of 7 and 8 Victoria ch., 66, sec. 16, of which the act of the United States of 10th of February, 1855, codified in section 1994, R. S., is substantially a copy, has been construed by the courts of Great Britain as converting an alien woman married to a British subject into a British subject

herself, as fully as if she had been born such, or had been naturalized by an act of Parliament.

Reg. *v.* Manning, 2 Carr. & Kir., 886 (61 Eng. C. L.)
Burton *v.* Burton, 1 Keys, 350.

Indeed, this construction was carried so far as to hold that an alien woman married to a citizen of the United States, who had become such by naturalization, and who, on his death, afterwards married an alien domiciled but not naturalized in the United States, had acquired by the first marriage a status which qualified her to prosecute a claim against the United States or a citizen thereof for injury done to her property during the interval covered by her second marriage. "It was the intention of Congress," says the opinion, "to bestow upon her a permanent status of citizenship defeasible only as in the case of other persons."

S. F. Phillips, Sol. Gen., 15 Opin. A. G., 600, case of Mrs. De Ambrogia.

It will be observed in all these cases, however, that the right sought to be enforced, or the responsibility established, concerned matters wholly within the undisputed jurisdiction of the sovereignty creating the status, and that terms are used in most of the cases which, perhaps, would have been more satisfactory had they been restrained by express qualifications in the first instance, instead of leaving that duty to be performed by necessary implication afterwards.

In the last case cited, for instance, if Mrs. De Ambrogia had been by birth a citizen of Venezuela, and had by virtue of her acquired status as a citizen of the United States of America, sought to enforce a claim against the Government of Venezuela, the question would at once have occurred whether it was competent for the United States to create a status of citizenship, the use to be made of which was to enforce a claim against another sovereignty claiming the natural allegiance of the claimant herself, and with this question

prominently before the mind, a distinction would have been taken, perhaps, between a mere municipal or civil status with a limited internal operation, and a political status with an extra-territorial operation and effect.

Persons made citizens by this act, born abroad and residing abroad, subject to the obligation to bear arms either in wars of defence or offence, at the call of the sovereignty within whose jurisdiction they reside, without question on the part of the sovereignty to which they owe what may be called the artificial status of citizenship, cannot in the nature of things be citizens of the United States as fully as if they had been born in that country, unless it can be held that a native citizen of the United States is subject to any foreign jurisdiction that may have the opportunity to seize and impress him into its military service. The point, however, is more speculative than real in this case, because it is very clear that whatever may be the status of Mrs. Willet or of her children with respect to their citizenship of the United States, whether full or limited, there can be no doubt whatever, that her husband and their father was a citizen at the time the injury in this case occurred, and continued to hold a claim against the Government of Venezuela until he died intestate in 1862. This being the case, Mrs. Willet claimed before the old Commission as administratrix and clearly had the right to represent a claim of a citizen of the United States, whatever may have been her own personal status. The functions of an executor and administrator are very much the same ; one represents the testator by virtue of his will, the other an intestate by virtue of the law. To appoint an executor is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who has an action against the testator's debtors. (Williams' Ex., 1, pp. 226.)

"The executor," says Lord Cake, "doth more actually represent the person of the testator than the heir doth the person of the ancestor, for if a man bindeth himself, his

executors are bound though they be not named, but so it is not of the heir." and this is true, also, he says, of the administrator. (Co. Lit., p. 2009.) Elsewhere he says that the administrator stands in *loco parentis* with same powers as executor by statute of 31 Ed., 111–2, Blacks., p. 510.

Hensloe's Case, 9 Rep., p. 40.

It has been held in England that an alien may be executor, and it has even been questioned whether an alien enemy may not act as such because the effects to be distributed are not his but anothers.

1 Williams, pp. 229–30.

See also Oliver Wendell Holmes, Jr., the Common Law, Lecture X, on successions *inter vivos.*

But another and distinct ground of objection was taken by Venezuela based upon the proposition that the warehouse was lawfully seized and occupied by her military forces for defensive purposes, and that the subsequent pillage and destruction of the stock of goods was a necessary and unavoidable incident of such seizure and occupation, and that the damage occasioned by it in consequence must be treated as *damnum absque injuria*, and therefore remediless. In this view we do not concur.

Admitting fully the doctrine that the safety of the state is the supreme law, and that the property and person of the citizen are subject to be taken for the public service whenever the exigency is sufficient to justify it, of which the state itself by the necessity of the case, must be the only judge, yet we cannot perceive that there was any necessary connection between the seizure of the warehouse for purposes of defence and the consequent pillage and destruction of the property which ensued. Besides, while the seizure of the building was lawful in the first instance for the purpose of repelling an attack or guarding the arsenal which was in the near neighborhood, no reason has been assigned for its con-

tinued use and occupation as barracks, long after the emergency had ceased to operate.

The Government of Venezuela recognized the justice of this proposition by admitting a claim on this account, and making payment in part. Indeed, we believe that such claims are universally recognized as constituting exceptions to the general rule which protects governments from making indemnity. It was also contended that a citizen of one country domiciled in another could have no greater rights than the citizens of the country where he chose to cast his lot; and that as a citizen of Venezuela would have had no claim on the justice of his government for reclamation in such a case as this, neither could the original claimant, who was a citizen of the United States. But from what we have said there ought to be no doubt that the Government of Venezuela would have respected such a claim if made on the part of one of her own citizens, and therefore the contention assumes what we do not admit to be true. On the whole, therefore, we are of the opinion that an allowance ought to be made in this case on the basis heretofore laid down, that is to say, for 50,000 pesos, on which we will allow interest at 5% from the 2d of August, 1859, deducting, of course, whatever sum Venezuela has paid on account of any of the certificates founded on the original award. The peso will be estimated at seventy-five cents expressed in the gold coin of the United States of America.

Claim of

ROBT. W. GIBBS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 17.

[July 10, 1890.]

FINDLAY, for the Commission:

After the dissolution of the old Confederacy of Colombia composed of New Granada, Venezuela, and Ecuador, it appears that provision was made by treaty in the year 1834, for the payment of the public debt, by allotting a certain percentage to each of these countries. Under this agreement Venezuela was to pay 28½%, New Granada 50%, and Ecuador 21½%. The present claim grows out of a "vale" bond, or certificate, as it is variously styled, for 5,000 pesos, issued out of the Treasury of Colombia under date of 26th of July, 1826, in payment of supplies furnished, consisting of cattle and money, by various parties who transferred their rights in the claim to a Mr. Robert H. Weyman. The documentary evidence in support of this claim, and on which it was allowed, was submitted, so the certificate recites, by Mr. Beaufort T. Watts, and then appears the following endorsement on the certificate:

"Pay to the order of R. H. Weyman.

"B. T. WATTS. [L. S.]
"R. H. WEYMAN.

"Witness:
"ROBERT WILSON GIBBS."

The proportion which Venezuela is bound to pay, if bound at all, under the allotment referred to, is 28½. Under the Mixed Commission between the United States and Ecuador, organized under the Treaty of November 25, 1862, an award was made against Ecuador for the proportion of this claim by the Umpire, who fixed the amount due on the basis of

21½%, with interest from date at 5% at $3,178.77. The proportion due by New Granada was also claimed under the convention between that country and the United States, concluded on the 10th of September, 1857, and was presented before both the Commissions organized under that treaty and the succeeding one of the 10th of February, 1864, between the same parties. The history of this presentation in brief is that the Umpire of the Commission, Mr. Upham, under the first treaty awarded to the claimant the sum, principal and interest, of $6,952.60, the Commissioner of New Granada protesting that only certain questions as to the nationality of the parties who had assigned these claims for supplies as aforesaid to Weyman, and as to the original documentary testimony in support of them, were submitted to the decision of the Umpire and no others. A certificate for the amount awarded was then issued, but without the signature of Mr. Hurtado, the Commissioner who made the protest, when the new Commission, under the treaty of 1864, with Sir Frederick Bruce as Umpire, was organized. The question as to the finality of this award and several others came up for decision by that tribunal, and was finally decided by the Umpire who held that these cases would have to be reheard and determined. Accordingly it appears by the journal of proceedings of that Commission that the cases of John D. Danels, the Good Return, Medea, Constancia, and *R. W. Gibbs* were referred to the Umpire for adjudication, and that on May 15 and 16, 1866, an adverse decision was rendered against the first four mentioned claims, but no action appears to have been then taken in the case of Gibbs. (See Journal, p. 212.) On p. 214, however, of the same journal it appears that this case was stricken from the calendar and docket, protest being made against the action of the board, and case not prosecuted. As we understand this entry in the light of the facts in this case it means that the counsel of Gibbs protested against the jurisdiction of the Commissioner to finally hear and determine his claim, al-

though it is not perfectly clear as to how far he took the chances of a favorable determination in his interest upon the preliminary question as to jurisdiction first passed upon by the Umpire. This claim as to the proportion to be paid by Venezuela was also passed upon by the Caracas Commission and an award agreed to by both the Commissioners for the United States and Venezuela was made in favor of the claimant for $4,344.90. The present counsel for Venezuela has admitted its justice, but contended that the award should be expressed in pesos instead of dollars.

Under the circumstances we will allow 28½ per cent. of the principal sum of 5,000 pesos, with interest from the 26th of July, 1826, at 5 %, until the 3d of September, 1890, at seventy-five cents to the peso, expressed in gold coin of the United States of America.

Claim of

AMANDA G. WALTER, Executrix, &c., of Thomas U. Walter, deceased,
v.
THE UNITED STATES OF VENEZUELA. } *No.* 52.

[July 10, 1890.]

LITTLE, for the Commission:

Thomas U. Walter, a citizen and an eminent architect and civil engineer of the United States, in the year 1843 entered into a contract with the municipality of La Guayra, the Government of Venezuela lending its concurrence and endorsement, whereby he agreed, not later than the end of the year 1846, to construct a mole and breakwater with appurtenant works, at that port, for 275,000 pesos in coin or its equivalent in currency. The sum of 150,000 pesos was to be and was paid by the completion of the work, which occurred within the time limited. The residue was to be discharged from certain entrance fees or duties received at the custom-house of La Guayra, with interest at the rate of 5 per cent. per annum, payments to begin two years after such completion, to occur quarterly or semi-yearly as said municipality might elect, and to equal 2 per cent. of the then import duties.

Payments and settlements were made by and with the Government from time to time until June 30, 1858, when the balance was reduced to 24,956 pesos.

Theretofore the Government had diverted the revenues so set apart by agreement for the discharge of this debt, and stopped further payment in derogation of Mr. Walter's rights. Since then nothing has been paid, notwithstanding the justice of the claim has never been controverted. In 1865 the claim

was presented to the Venezuelan Government through the American Legation at Caracas. It comes within the purview of the present treaty.

The only question made respecting it before us is as to the computation of interest.

It is claimed on the one hand that interest should be computed with quarterly, or at least, with semi-annual rests, as that mode had been adopted or sanctioned by the Government during the continuance of the payments; and on the other, that only simple interest is allowable. We take the latter view. This was a Venezuelan contract where compound interest was prohibited by law. If the Government chose to allow it in disregard of the law, that does not authorize us to do so; nor are we called upon to review and rectify the action of the Government in that regard.

The allowance will be for $24{,}956\frac{53}{100}$ pesos, with 5 per cent. interest from June 30, 1858, to September 2, 1890, inclusive, expressed in gold coin of the United States.

There are two *pesos* known to commerce, the *peso fuerte* and the *peso sencillo*. The former was the old Spanish silver dollar, equal in value, until modern years, the world over, to 100 cents in gold. The latter is meant when the general term is used in transactions without the qualifying word. It has varied somewhat in value, from time to time. According to letters* received by the Commission from the Director of the Mint, and other sources of information, we estimate its present value at 75 cents to the dollar, expressed in gold coin of the United States.

The entry may therefore be for $48,826.40, gold coin of the United States of America, as of September 1, in favor of the claimant.

---

*May 27, 1890, and June 9. 1890.

Claim of

AMOS B. CORWIN
v.
THE UNITED STATES OF VENEZUELA. } *No.* 39.

[July 10, 1890.]

LITTLE, for the Commission:

The Mechanic, an American schooner, flying the flag of the United States, Taber, master, sailed from Havana, April 17, 1824, with a general cargo, bound for Tampico, Mexico, *via* Key West. A part of the cargo consisted of goods valued at near $20,000, shipped from the Cuban port by Joaquim Hernandez Soto, "by order and on account and risk of Robert Barry, of Baltimore, an American citizen," and consigned to "Ant. M. Miranda, Pueblo Viejo, Mexico, or his assigns, he or they paying freight on the said goods."

The vessel, with Soto aboard, arrived at Key West in due course, and departed therefrom May 4, with her sea papers in proper form. Two days out she was captured by a privateer, the *General Santander*, Chase, master, under commission of the Republic of Colombia against Spain, and detained under a charge of carrying enemy's goods, Colombia being then at war with Spain, for independence. Soto, with some eight others, being taken from the vessel, she was sent in charge of a prize crew to a Colombian port for adjudication of the goods seized, before the proper tribunal. In due season libel proceedings were instituted against the cargo before the Colombian prize court at Puerto Cabello, and on the 9th of July, after hearing, the Soto invoice was found to be enemy's property, and condemned as good prize.

May 14, Barry procured insurance on the goods against all loss, including loss by capture, past and prospective, occurring during that trip, in two New York companies, to

wit: $12,000 in the Atlantic Insurance Co. and $7,000 in the Hope Insurance Co., of that city. In January, 1825, the Atlantic paid its policy in full, and in June following the Hope paid it's, with $175 interest, making in all $19,175, covering the full value of the goods. Soto made a formal assignment, about this time, of all and singular his rights pertaining to said goods, and growing out of the capture thereof, to the insurance companies.

It does not appear that he made any exertion to save them from capture, by the assertion of ownership as a neutral, either then or afterwards, in the prize court. It seems he abandoned them at capture. A year later, when the insurance companies were preparing their case for presentation before the Colombian Government, he made affidavit that he was a native of Spain, but a citizen of Mexico, engaged in mercantile business there, and had been since 1819; that he invoiced the goods in the name of Barry for safety, and that no Spanish subject had any interest whatever in them at the time of shipment, or afterwards, they being his sole and exclusive property.

In 1826, the Government of the United States presented the claim of the insurance companies for indemnity, in the premises, against the Government of Colombia, it being alleged that the goods were neutral, and not, as found by the court, enemy's property. But nothing was allowed by that Government.

After—upwards of 25 years after—the dissolution of Colombia (1830) and the adjustment of her liabilities between the constituent States, fifty per centum thereof falling to New Granada, the insurance companies assigned that portion of the claim which was against that State, namely, one-half of it, to the present claimant, Amos B. Corwin.

He prosecuted the portion so assigned against that Government before the Mixed Commission under the treaty, between New Granada and the United States, of 1857, and secured an award for the amount thereof, to wit, the half of

$19,175, with interest to the date of the allowance, 1862, amounting in all to $——.

In 1863, the American Minister at Caracas asked the Venezuelan Government, in behalf of Corwin, to pay its proportion of the insurance claim, to wit, 28½ per centum.

The claim for that proportion was presented to the Caracas Commission of 1867–'68, which awarded him $15,629.87. It is now made before us and amounts with interest to near $30,000.

It is well settled that where there is abandonment of property under circumstances like these, and the entire loss is paid, the insurer succeeds to all the rights of the insured, of whatever kind, respecting the property, as of the time of abandonment (Phillips on Ins., § 1712 *et seq.* Hollbrook, adm'r, *v.* United States, 21st Ct. Claims, 438). The conveyance by Soto to the insurance companies, in 1825, was therefore quite superfluous. The companies were subrogated to his rights and to them only. A question suggests itself, whether, in respect to this treaty, supposing Soto to have been a Mexican, the companies do not succeed simply to the rights which he would have, if living, but for the payment of the insurance. If so, they cannot claim here, for he, not being a citizen of the United States, would have no standing under the treaty. We think, however, that it is not their *status.* To hold so, would be to say there may be invasion of neutral rights without remedy. Mexico refuses to interfere in Soto's behalf, for he is indemnified. It refuses the companies, for they are Americans. The United States refuses them because they have only the rights of Soto, and he has no claim on its services, for he is a Mexican.

The true view as it seems to us is, that the companies are to be regarded as having succeeded to Soto's rights at the seizure of the goods, May 6, and, of course, *cum onere.* If the capture was wrongful, the wrong was consummated and then

first made apparent by the judgment of the prize court, and consummated *as against them.* They therefore stand in respect of the wrong, not in Soto's shoes, but in their own.

They consequently have a standing here in their own original right.

Are they bound by the judgment of the prize court?

It has been suggested in argument whether, as indeed it seems to have been claimed by the American Minister at Bogota in 1824–'27 that, Colombia, having been Spanish territory at the time, was bound as to the United States by the treaty between the latter and Spain of 1795, which embodied the doctrine that "free ships make free goods," making its violation an act of piracy; and that such obligation continued during her struggle for independence. Mr. Chief-Justice Marshall, 9 Cranch, 191, said:

"The United States having formed a part of the British Empire, their prize law was ours; and when we separated it continued to be ours, so far as adapted to our circumstances, and was not varied by the power which was capable of changing it."

It is likewise probably true that the Spanish prize law, impressed, it may be, with such conventional modifications as to particular States as were from time to time made, became the prize law of the Spanish-American colonies, subject to the qualifications named. Conceding its operation as to Colombia at independence, it continued, under the principle stated, only so long as adapted to her condition, and she, of course, was the judge of that. The very act of sending out privateers to prey upon Spanish commerce was at once a determination that the Spanish prize law, with its conventional modifications as to the United States (if before in force), was not adapted to her circumstances, and at the same time a decree "varying it by her power," in conformity with international law.

The question arose in the case of the *Señora*, a Spanish vessel captured by a Carthagenian privateer, and taken again by an American cruiser, supposing it British, during the war of 1812.

The Supreme Court of the United States said:

"The treaty with Spain can have no bearing on the case, as this Court cannot recognize such captors [the Carthagenians] as pirates; and the capture was not made within our jurisdictional limits. In those two cases only does the treaty enjoin restitution." (4 Wheaton, 497.)

Said the same Court in case of the *Pastora*, a Spanish vessel captured by a privateer under the flag of La Plata, 4 Wheaton, 63, *per* Marshall, C. J.:

"The case of the United States *v.* Palmer, 3 Wheaton, 610, establishes the principle that the Government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new Governments of South America may employ against their enemy."

It seems to us, therefore, clear that Spain's engagements to the United States, under the treaty of 1795, did not extend to and bind Colombia in respect of the doctrine stated, at least at the time of this capture, and that the law of nations in this regard was then her only guide, she not as yet having bound herself contrariwise by treaty.

The seizure by the *Santander* of the *Mechanic*, and the sending of her to Puerto Cabello for authoritative decision as to her cargo, under a claim of its being enemy's (Spanish) property, and the adjudication there by the Colombian prize court of the question, were, as is conceded, authorized by the law of nations. But it is contended the court found that Soto was a Spaniard, when he was in fact a Mexican, and that its judgment being predicated on that error of fact, is not binding on these companies as respects their demands against the government of the captor.

Undoubtedly a wrong done by a government through its prize courts is redressible in a proper case the same as if done through its other courts or agencies. But the wrong must be shown.

Although a prize court is summary in proceeding, acting in time of war when impartiality in procedure and decision is not, in *practice*, generally thought to be attained; yet its

judgments are in the eyes of the public law respected much as judgments of municipal courts are. Mr. Wheaton says:

"The *theory* of public law treats prize tribunals established by and sitting in the belligerent country exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both."

The Supreme Court of the United States declared a prize tribunal—

"A court of the law of nations, and takes neither its character nor its rules from the municipal law." (Schooner *Adeline*, 9 Cranch, 244.)

When the United States complained to Denmark because of the sentences of her prize courts affecting citizens of the United States during the war between that Power and Great Britain, it was not that those sentences were against the weight of the evidence and probably wrong; but that they, being affirmed by the court of last resort, amounted to "*a denial of justice.*"

Mr. Wheaton, quoting with approval from the notable report of Sirs George Lee, Dudley Rider, Dr. Paul, and Mr. Murray to the British Government, 1753, on the reprisals by Prussia on account of captures by British cruisers and condemnations by British admiralty courts, says it plainly shows:

"That in the opinion of the eminent persons by whom that paper was drawn up, *if justice be denied in a clear case by all the tribunals*, and afterwards by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed."

It is only, says Vattel, "in cases where *justice is refused or palpable and evident injustice is done*, or rules and forms openly violated," that definite sentences should not be respected.

"The British Court," he says, "established this maxim with great strength of evidence on the occasion of the Prussian vessels seized and declared lawful prizes during the last war."

(See Crousden *et al. v.* Leonard, 4 Cranch, 404; Vattel, Bk. 2, § 84; *The Mary*, 9 Cranch, 142; 1 Wheaton, 238; *Santisima Trinidad*, 1 Brocke, affirmed in 7 Wheat., 283.)

Says Bluntschli:

"The belligerent which constituted the prize courts is always responsible to neutral states for every *manifest* violation of international law committed to the prejudice of the neutrals by that court."

We do not understand the doctrine announced by the Commissioners under the treaty of 1794, between the United States and Great Britain, to be at variance with the foregoing. While they refused acquiescence to the contention that a prize sentence affirmed by the Lords Commissioners was conclusive on the parties (except as to the *rem*), they seemed to place it (otherwise) along with other judgments. They said:

"A sovereign is as much liable for wrongful action of prize courts as he is for the wrongful action of any other court."

Their insistence may be condensed in almost their exact words: Prize jurisdiction must be *rightfully* used by the state that claims it. From this no one will dissent.

Counsel for Venezuela, then, is quite right in saying, "the question for us is not whether upon the facts before the prize court we would have come to a different conclusion." It is whether the proceedings and judgment of that court were *manifestly and certainly* wrong, to the prejudice of the claimant.

We are not convinced of their wrongfulness.

The Colombian prize court was duly established in pursuance of a law of the Colombian Congress, passed October 14, 1821. That law authorized the Executive power to establish prize courts in the Republic, and promulgate rules and regulations for their procedure and government. This was done by Executive decree, March 30, 1822, in which the rights and duties of parties and officers in prize matters are set forth fully, and with precision, and, so far as we are advised, in conformity with the requirements of the public law and the usages of nations in this regard.

The prize court consisted of the Senior Commandant of the Department, with an *asesor* learned in the law. An appeal lay from its decision to the Supreme Court of Justice.

We see in these laws no basis for the complaint, therefore, of one of the insurance companies, to Mr. Clay, in 1825, against the Colombian "ordinance" establishing the court.

The proceedings before the tribunal seem to have been regular and in accordance with usage.

On the hearing, July 9, 1824, before the "Senior Commandant-General of the Second Marine Department finding himself associated with his Asesor in the Hall of the Tribunal," to quote the language of the record, the following proofs as appears from the record—giving its terms—were offered:

"Documents are recapitulated Nos. 1 to 8.

"No. 8. Ten signed letters which state that all the cargo is Spanish property, which it was endeavored to protect beneath the American flag.

"No. 9. Four declarations relating to the act of detention by the consignee captain [master(?)], passengers, supercargo, and pilot.

"Captain [master] declares that the only articles which he knows to be American property are those belonging to Mr. Gousche, supercargo.

"Joaquin Hernandez Soto, under consignee and passenger, declared himself to be a native of the kingdom of Castille, in Spain; that he did not know who are the owners of the cargo, although in part owner and consignee himself, which portion he shipped on board an American vessel for greater security thereof.

"The captain of the schooner *Mechanic* makes the following representation: That the act of having detained this schooner evinced that the cargo she had on board was not considered to be American property, except that part belonging to Gousche, for all the rest was shipped by merchants of Havana, and he believes it is their exclusive property; that he knows that almost all the merchants of Havana endeavor to guard their interests under the American flag in order to escape capture by the Colombian privateers; that he has nothing to state in favor of said cargo, and judges that it is good prize."

What the supercargo or the passengers said is not intimated, and there is nothing in the case to show. The letters are not here, nor all the eight (ship) documents, and all we know of their contents is stated in the record. From this

fragmentary showing, all that has come to us, so far from finding the prize judgment manifestly wrong, it seems to us justified.

The letters were said to show *all* the cargo was Spanish. The captain said it was shipped by merchants of Havana. He supposed it Spanish property and good prize. He knew those merchants were accustomed to send their merchandise under the American flag. Soto claimed to be a native of Spain, but did not pretend to any one on board to be a Mexican; and disclaimed knowledge of the ownership of the goods. There was no showing of neutral property before the court, aside from the small amount acquitted, and under the law the burden was upon him who asserted neutrality of property to prove it. The conduct of Soto was singular, to say the least. If he were a Spaniard, one can readily see why he shipped the property in Barry's name and disowned it on the ship. But why should he do either, if he were a Mexican? There would be a reason for this if the property had been subject to capture in an American vessel by a Spanish cruiser, for Mexico was also at war with Spain. But under the treaty of 1795, it was not so subject to capture. To attempt it would have been an act of piracy, subjecting the captors to execution, and their government to full indemnification.

His explanation, therefore, of shipment in Barry's name for greater safety does not explain—*if* he was a Mexican citizen. The circumstances all point to his being a Spanish subject.

Apropos to the question of the regularity and sufficiency of this proof, attention is directed to this passage in the opinion of Judge Story in the case of the *Isabella*, 6 Wheaton, 1, decided not many years before 1824:

"It is to be recollected," he said, "that by the settled rule in prize courts the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn shall in the first instance come from the ship papers and the passengers on board."

This judgment was, in our opinion, in accordance with the public law. Soto, other owners of the cargo, and the insurance companies through the master of the ship, were parties to the proceedings and bound by them unless involving manifest injustice. (Case of *Mary*, *supra*, Crounden *et al. v.* Leonard, 4 Cranch, 34.) The naked affidavit of Soto, a year afterwards, cannot avail against it.

And that affidavit taken at its face was at least of questionable sufficiency, under the doctrine laid down in the case of *Thirty Hogsheads of Sugar* (9 Cranch, 328), by Chief-Justice Marshall, quoting a like enunciation by Sir William Scott. In that case, Bentzon was a subject and resident of Denmark, owning and operating a plantation in Santa Cruz island, then in possession of the British. Thirty hogsheads of sugar manufactured from the products of said plantation by Bentzon's agents and for him, were shipped from the island on a British vessel, consigned to a house in London for account of Bentzon. On their way (during the war of 1812) the vessel was captured by an American privateer, and brought to Baltimore, where it and the cargo were libelled as enemy's property. Both were considered as good prize, although the United States was at peace with Denmark. The ground of the decision as to the sugar was that it took its character, *not* from that of the owner, but from that of the soil on which the cane was produced. How far or whether the goods of Soto may have been of his own manufacture in Cuba, arising from products grown there on his own land, there is nothing to indicate.

There is still another objection to this claim, even if the prize sentence was erroneous. This is not a case, it may be premised, where its principles have been settled by the court of last resort, and where an affirmance would follow as a matter of course because of such former judicial settlement. There was involved a simple question of fact, to wit: Whether the Soto invoice was enemy's property.

It is thoroughly well settled that in such a case—as indeed

is true of judicial sentences generally, where appeals are reasonably attainable—a State's liability begins only when the court of *last resort*, accessible by reasonable means, has acted on it.

The doctrine is well stated by Rutherford, Inst., vol. 2, ch. 9, § 19, quoted approvingly as a part of his own text by Mr. Wheaton, page 465, 6th Am. Edition. He says:

"In order to determine when their right to apply—[those injured by wrongful sentence of prize court]—to their own State begins, we must inquire when the exclusive right of the other State to judge in this controversy ends. As this exclusive right is nothing else but the right of the State to which the captors belong to examine the conduct of its own members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the State should be answerable for their acts, until those acts are examined by all the ways which the State has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral State can have no right to apply to their own State for a remedy against an erroneous sentence of an inferior court till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct; and, till their conduct has been examined by all these means, the State's exclusive right of judging continues."

The law of Colombia provided for appeals from its prize courts to the Supreme Court of the Republic, as seen, yet there was no attempt at appeal. In fact, the captain of the vessel seemed to acquiesce in the sentence—at least, he thought, as he stated to the court, the goods condemned good prize. There is no reason to suppose he acted dishonestly or collusively. The conduct of Soto was sufficient, with the other facts stated, to justify his remark. If Soto abandoned the goods to their fate, why should the captain further litigate? He, of course, knew nothing of this particular insurance, for it was effected eight days after the capture.

Still he would reasonably assume insurance, and the law made him, being the master of the ship, the agent of the companies, in their absence, to protect their interests in this regard. His failure to appeal, if such under the circumstances became his duty, was not the fault of Colombia.

There is still, apparently, another objection to this claim as it is presented on the papers transmitted us. It is prosecuted by Corwin. The papers here fail to show that he ever had other interest in the insurance demands than the portion prosecuted against New Grenada.

The transfer to him by the Atlantic Company was, to wit:

"For the proportion of loss said Government [New Grenada] is liable to pay by reason of the seizure of the cargo of the schooner *Mechanic* in 1824 by the Colombian privateer *General Santander*. The said State of New Grenada being liable to pay the one-half part of the loss sustained by said company by reason of such seizure, of the sum of about $6,000, with interest. To have and to hold the said hereby sold and assigned premises unto said Amos B. Corwin, his heirs and assigns, forever."

The transfer by the Hope Company, made at the same time, is in substantially the same terms, save as to the amount of the interest transferred.

But this half so assigned to him was allowed entire by the Bogota Commission in 1862, and, so far as appears, settled by New Grenada.

Corwin's presentation through Minister Culver of a claim in his behalf upon the Venezuelan Government, in 1863, for her 28½ per cent. of the insurance, was not based upon any interest held by him so far as disclosed here. He was not a claimant of that portion of the alleged indebtedness within the meaning of the treaty so far as appears. It is proper to say, however, that we should not be disposed to rest the decision upon the present showing in this regard without further inquiry, if the claim were good otherwise. It may be the diplomatic correspondence would supply the deficiency.

Again, even if the Corwin demand in 1863 could be

shown to have been authorized, it seems to us it came too late, under our announcement in case No. 36, if that was its first presentation. Venezuela had then been a state 33 years. The demand was 39 years old. It had been presented to the old Republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had, presumably, passed away, and other means of defence become dissipated. But owing to the possible incompleteness of the record in this regard, we prefer to base our conclusion upon the other grounds stated, assuming proper and timely presentation of the claim against Venezuela.

The claim is disallowed.

Claim of

FREDERICK WIPPERMAN
v.
THE UNITED STATES OF VENEZUELA. } *No.* 22.

[July 10, 1890.]

FINDLAY, for the Commission:

This claim was submitted to the Caracas Commission, and on the disagreeing votes of the two Commissioners was referred to the Umpire for decision, and by him rejected on the 2d of July, 1868.

The facts briefly are, that the claimant, a naturalized citizen of the United States, was appointed consul to Maracaibo in 1861, and continued to act as such with the approval of Venezuela until the 28th of May, 1862, when he sailed in the barque *Clara Rosa Sutil* for New York, on a five months' leave of absence on account of ill health. The barque was stranded on the morning of the 1st of June, on the coast of Goagira, which appears to have been subject to the forays of a tribe of Indians residing or roaming within the jurisdiction of Venezuela, but never fully subjected to her authority. These Indians came on board and acted in such a threatening manner that the captain, crew, and passengers thought it was safest to leave the ship and return in the ship's boats to Maracaibo for assistance. The cargo consisted principally of coffee, but among other things on board were twelve trunks and boxes, the property of the claimant, containing a miscellaneous assortment of personal effects, and valuable sketches and drawings of great use in his profession as architect and civil engineer, and also a choice and well-selected library of classical, modern, and scientific literature.

All these things were stolen or destroyed by the Indians, at a loss estimated by the claimant of $13,000. On the raid being reported at Maracaibo, the governor of the province

immediately despatched a war vessel to the scene of the outrage, and by her timely arrival and the use of cannon the Indians were driven off, and much pillage, both of the vessel and her cargo, prevented. Such damage, however, was done to her rigging and sailing apparatus that it was deemed advisable to send to New York for repairs, and the claimant took passage in another vessel bound for that port, where he arrived safely and without further accident on the 6th of July, 1862. Three days afterwards he addressed a communication to the Department of State, complaining of the outrage, insisting that it was permitted by the Government of Venezuela for the want of those necessary and indispensable precautions which the laws of nations exact for the protection of aliens domiciled within a foreign jurisdiction, and especially consuls, and claiming indemnity in the sum before mentioned.

No action, as far as the papers disclose, was then taken by Mr. Seward, then Secretary of State, and the case appears to have been neglected until revived by the claimant in a communication to the State Department, under date of the 27th of February, 1868, in which redress is again asked, and which was referred by the Secretary to the Legation at Caracas, and by it submitted to the Commission then in session, with the result before stated. It is resubmitted, under the treaty of December 15, 1885, for our action, not, however, on any claim by Mr. Wipperman of the injustice of the previous decision, in which he appears to have acquiesced, but as one of the claims which is entitled to consideration by reason of the sweeping provisions of that convention, which submits all the claims of citizens of the United States for adjudication by this Commission, which were considered by the former one without regard to the fact whether they were allowed or rejected, or whether the claimant was dissatisfied with the decision or not.

The learned counsel for the United States, with his usual industry and ability, has filed a very elaborate brief in sup-

port of the claim, with the conclusions of which, however, we regret that we cannot concur, although we can readily give our assent to most of the general reasoning in which he indulged on the subject of the duty of a foreign government with respect to the protection of official representatives of another sovereignty coming within its jurisdiction. It is perfectly true, as contended by the learned counsel, that the citizens of one State, whether holding office or not, but residing or doing business within the jurisdiction of another State, are entitled to the fullest protection of the laws of that State, both in their persons and property, and that on the authority of the case of the Spanish consul in New Orleans, after the execution of the unfortunate victims of the Lopez expedition, as stated by Mr. Webster, then Secretary of State, there would seem to be an additional claim upon this protection growing out of the consular office of the person injured, although it is to be noted that Mr. Webster in the case referred to, observed that the case was a new one, and that the circumstances were such that indemnity would be offered without searching for precedents.

But there can be no possible parallel between the case of a consul residing in a large city inhabited by civilized people, whose house is deliberately invaded in open day, and whose property is pillaged or destroyed by acts of violence, aimed at him in his official capacity and accompanied with studied insults to the government he represents, and all proceeding from a riotous body of persons who, presumably, at least, ought to have been within the preventive or restraining power of the police or the military, and the accidental injury suffered by an individual in common with others, not in his character as consul, but as a passenger on a vessel which has been unfortunate enough to be stranded on an unfrequented coast, subject to the incursions of savages, which no reasonable foresight could prevent.

The case would present more points of comparison if some savage tribe of Indians on the war-path had unexpectedly

stumbled upon a consul, we will say of Venezuela, traveling for his health in some of the secluded by-paths of Arizona or New Mexico, and then and there, without respect to the dignity of the consular office and the law of nations, had divested him of all his valuables and then proceeded *suo more* to take his scalp. Could it be pretended that the United States could be held responsible for an act of violence of this kind, although committed by persons actually within her jurisdiction and nominally subject to her authority? It is notorious throughout the world that outrages of this kind on the western frontier of the United States are more or less frequent, and that the whole military force of that country, out of garrison, has not been sufficient to prevent the occasional robbery or murder of innocent persons, whether aliens or citizens. Unless a government can be held to be an insurer of the lives and property of persons domiciled within its jurisdiction, there is no principle of sound law which can fasten upon it the responsibility for indemnity in cases of sudden and unexpected deeds of violence, which reasonable foresight and the use of ordinary precautions cannot prevent. Of course, if a government should show indifference with reference to the punishment of the guilty authors of such outrages, another question would arise, but as long as reasonable diligence is used in attempting to prevent the occurrence or recurrence of such wrongs, and an honest and serious purpose is manifested to punish the perpetrators, the best evidence of which, of course, will be the actual infliction of punishment, we fail to recognize any dereliction in the performance of international obligations, as measured by any practical standard which the good sense of nations will permit to be enforced.

Nor do we perceive that there is anything in this ruling at variance with the propositions contended for by the United States and supported by an elaborate citation of authority by its counsel. The very language used in argument, by Mr. Cushing, in behalf of the United States, before

the Geneva Commission and now quoted by the counsel of the United States in his brief, is strikingly applicable to the facts in this case.

"The general allegation," said Mr. Cushing, "that acts committed furtively in remote and unfrequented coasts, against the wishes of a government and in spite of *well intended, active efforts to prevent them*, are not acts over which the government could reasonably be expected to exert a control, commands the assent of the United States. They would not themselves consent to be held responsible for such acts." The italicized part of the concession seems to be regarded as destructive of any value it might have in determining the rights of the claimant, which are sought to be founded on the assumption that there was *no* well intended, active effort on the part of Venezuela to prevent the foray of the savages.

But there is nothing in the record to show that the government had any notice of the incursion or any cause to expect that such a raid was threatened, and while it may be true that governments are *prima facie* responsible for the acts of their subjects and aliens commorant within their jurisdiction, this is a presumption which is always rebuttable by any facts which will afford a reasonable excuse for the dereliction against which the complaint is aimed. A different rule of responsibility applies where the act complained of is only one in a series of similar acts, the repetition, as well as the open and notorious character of which raise a presumption in favor of knowledge being brought home to the authorities and with it corresponding accountability. It is in such a case that Sir Robert Phillimore says that it is to be "presumed that a sovereign knows what his subjects openly and frequently commit, and as to his power of hindering the evil this likewise is always presumed, unless the want of it be clearly proved." (Phill. Int. Law, p. 23.) The present case stands upon a different footing entirely. The tort committed proceeded from the wanton

depredation of a lawless band of savages on a vessel unhappily stranded at a point where she could be made the easy prey of such marauders, before notice could be received by the government, and under circumstances which satisfy us that notice is not imputable to the government, and that the raid was one of those occasional and unexpected outbreaks against which ordinary and reasonable foresight could not provide. As soon as the facts were reported, immediate steps were taken for the relief of the vessel, and the savages were opened on with grape and cannon balls and dispersed. The claim is rejected.

Claim of

JACOB IDLER
v.
THE UNITED STATES OF VENEZUELA. } *No.* 2.

[July 14, 1890.]

LITTLE, for the Commission:

This case, because of its importance and complications of controverted fact and law, is treated with unusual and, perhaps, unnecessary fulness.

STATEMENT OF FACTS.

In 1817 Venezuela, then engaged in war for independence, through her chief magistrate—military and civil—Simon Bolivar, issued what was denominated a "diploma," addressed "To all those who may see these presents," from which the following extracts are taken:

We do hereby authorize Brigadier-General Lino de Clemente, and, in case of his death or absence, Señor Pedro Gual, both of them residents of Philadelphia, in the United States of North America, to enter into all the political and commercial stipulations and agreements herein to be explained, to the faithful fulfilment of which we do pledge beforehand, in the most sacred manner, the faith of the Republic." * * *

"And give them authority to execute validly and juridically, in the name of the Republic, subject to the instructions given them separately, all kind of deeds and instruments of obligation, which they may have agreed upon with other parties, in the form and on the terms and conditions which may have seemed *to them* to be the best, it being understood that *we* shall abide literally by whatever they may have agreed to, without entering into any inquiry or examination, or making any remarks or objections on or to the contracts made by them. All of the said contracts which the said agents or commissioners may make, or enter into, are beforehand approved of by us, as made and entered into in use of the full unrestricted powers and faculties given them by us, faculties and powers which authorize them to deal and stipulate in the name and in behalf of the Republic, and to mortgage her property and her revenue and resources. The said property, revenue, and resources shall be pledged with absolute preference to the payments of the debts contracted by virtue of this authority and in use thereof by the said Brigadier-General Lino de Clemente, or by Señor Pedro Gual, as the case may be, if the former is absent or dead."

The "instructions given them separately," above referred to, include these paragraphs:

"*Second.* They shall purchase vessels of war, muskets, gunpowder, lead, clothing, equipments, sabres, helmets, saddles, harness, and all kinds of elements of war, and shall draw on the exchequer of the Republic, the prices to be paid either by giving their equivalent amount in cocoa, coffee, indigo, cotton, mules, horned cattle, hides, and produce of the country, or by setting off equivalent sums due the same exchequer for duties on imports or exports, as set forth and agreed upon in the contracts."

"*Fourth.* They are empowered to grant the contractors who may take to our ports the above said elements of war, all the advantages that may be deemed just, relative either to preference in the payment, or to the choice of the particular kind of articles produced in the country, or to the amount being credited to set off custom duties."

From its address and contents, it is manifest the diploma was intended to influence dealings with, as well as to define the authority of, the agents of that province.

Beginning that year, accordingly, in the exercise and on the faith of the powers thus given, contracts on behalf of Venezuela were entered into at Philadelphia, with Jacob Idler, a merchant of that city, whereby, as it seems—though the contracts themselves have not been exhibited, and their purport is in some degree inferred—he undertook for himself or for himself and those concerned or to be concerned with him, called in the papers his "associates," to furnish military supplies for the use of the patriot forces in that country.

The associates were Bogart and Kneeland, Thaddeus Phelps & Co., and Benjamin L. Swan, of New York, and Hammond and Newman, of Baltimore. Just to what contracts or shipments their interests respectively extended is involved in some uncertainty. There is an agreement, however, on file, made March 17, 1868, which frees the case from embarrassment in this respect if its recitals touching Hammond and Newman can be taken as correct, as we suppose they may be. All were citizens of the United States, and representation is made here in their behalf.

For three years Clemente acted as the agent of Venezuela in that behalf; then, instead of Gual named in the diploma,

Torres succeeded to the agency, but whether on behalf of the same principal is one of the questions raised.

The business on the agents' part seems to have been done with Idler, who was looked to as the responsible contractor. During four years, the most uncertain perhaps in the long struggle of the Spanish-American provinces for liberty, he alone, or in association as aforesaid, in the execution of the contracts thus made, sent out large quantities of arms and army stores to Venezuela. Of flints there were over 250,000; of fire-locks over 25,000; and of muskets, in the last eighteen months of the period, over 11,000 (the record does not show how many before).

At the completion of the contracts on their part, and for several years afterwards, four invoices remained, contrary to agreement, in largest part unpaid for. One of these was by the brig *Elena*, lost by capture at sea in 1817 through the alleged fault of the Venezuelan agent, and liquidated by the agreement of the parties in 1820; two by the brigs *Wilmot* and *Endymion*, arriving in Angostura in May and November, respectively, 1820, and a fourth and last, also by the *Endymion*, arriving at La Guayra in October, 1821. The last embraced 4,360 French muskets, which became a subject of controversy.

The balance remaining due on these four shipments, exceeded, according to liquidations, in 1824, $157,000—a large sum in that time to be owing an American firm, to say nothing of other items of charge brought forward later, connected with the transactions, amounting to nearly half as much more.

Naturally, Idler and associates after their money was overdue a few months, became solicitous about payment.

The banks which had accommodated them became urgent. Pressing requests—even appeals to the South American authorities were made—but without present relief. Payment on account was urged without response. Then began a course of liquidation resulting in litigation, and, finally, in diplomatic action, which, taken all in all, presents certainly a remarkable chapter in the history of reclamations.

The Idler claim has been a theme for the press and pamphleteer in both countries. It has arrested the attention of the foreigner. Among the papers is an autograph letter from Rudolph Humboldt on the subject, a nephew of the great savant, and himself a distinguished traveller and scholar. The claim has been before the Congress, more than once, of each country, and has been the subject of, at least, earnest discussion, long continued, and ending only with the treaty of 1866, between the two governments.

Among the difficulties confronting the contractors at the outset of their efforts at collection, seems to have been uncertainty as to the place and source of settlement. The remark may be applied also to the South American authorities. And there is not unanimity even now among the learned upon the question, as the *expediente* and briefs—numerous and voluminous—in the case abundantly testify.

Just here it may be well to note some changes that had taken place meantime affecting Venezuela. In 1819–'21, Venezuela and New Grenada united and formed the Republic of Colombia. On the one hand, it is contended, the union occurred December 17, 1819; on the other, July 12, 1821. The question will be recurred to further on.

The "Fundamental Law," so called, of July 12, 1821, adopted by the Colombian Congress, provided:

"The debts which the two peoples may have contracted separately are acknowledged *in solidum* by this law as a national debt of Colombia, and all the property of the Republic is responsible for its payment."

A commission was created to sit at Bogota for the liquidation of such debts.

The constitution of Colombia was adopted August 30, 1821. Under it a complete transformation in administrative affairs took place. A central government was established at Bogota. The chief executive power was vested in a president. Bolivar was made that officer, and clothed with extraordinary authority. The territory of Colombia was di-

vided into seven departments. There were three in Venezuela, each with its distinctive name. The central one, comprising not more than a third of Venezuela, though greatly more than that proportion of its inhabitants and wealth, was called the Department of Venezuela. Its executive seat was Caracas.

The law establishing the division provided:

"The political command of each department is vested, pursuant to the constitution, in a magistrate called *Intendente* under the orders of the President of the Republic, whose natural and immediate agent he shall be."

He was invested, "in his capacity of chief of the department," as the law ran, with all the police, judicial, and administrative powers formerly conferred upon colonial chiefs or governors by the foreign parent government. These were extensive. There was also provided for each department, quoting from the statute, "a deputy learned *asesor* with the same object, jurisdiction and powers."

Venezuela was made a judicial district, having a superior court with three judges of general jurisdiction, sitting at Caracas. This was subordinate to the Supreme Court at Bogota. The Intendant held a court which was inferior to the Superior Court. It had jurisdiction, among other things, in treasury matters till 1825, when the Prefect's court was established in its stead. Still the Intendant seemed to exercise an authority in that behalf, not well defined.

Such was the governmental situation in 1822.

The last three invoices had been purchased by Torres after April 1, 1820. Whose agent was he then, Venezuela's or Colombia's? Were liquidation and payment to be made at Caracas or Bogota? These were questions then as well as now.

The four accounts, appended to this opinion, were made out against Colombia.

There were three liquidations of these accounts current, more or less complete and correct.

The first was in 1822–'23, by Idler and associates through their attorney-in-fact, William Duane, a distinguished citizen and editor of Philadelphia, with the Colombian Board of Liquidation at Bogota, established under the law mentioned. It was interrupted by the arrival and interference of an agent of the associates, and by the Venezuelan Intendant, to whom Duane had first gone, and who, after some delay, had disclaimed jurisdiction of the accounts and stated that Bogota was the only place of liquidation and payment. He now asserted the "exclusive faculty" of settlement at Caracas by custom-house allowances—an assertion recognized and acted on then, it seems, by the Colombian authorities. So far as Duane had proceeded, there was shown a balance due the contractors of $104,412, for which a certificate was issued by the Board, but nothing ever came of it. The other two liquidations were made late in 1824; one by Idler (who had gone out to Caracas in May, 1823), with the Venezuelan Intendant, Escalona, showing a balance due the contractors, including interest at 6 per cent., to its date, November 21, of $164,763.89; and the other by the associates, without Idler's authority, it is claimed, through their attorney-in-fact, Henry Ogden, with the Board of Liquidation, at Bogota, showing a balance, including interest to its date, December 31, of $119,265.84 due them, and $38,076 (estimated as of that date from their balance) due Idler; in all, $157,342.01.

After Ogden's settlement Idler, denying its legality and correctness, authorized his attorney-in-fact, Santos Michelena, June, 1825, at Bogota to receive his share. The amount due him thereunder was calculated by the Board of Liquidation with interest to June 25, and found to be $38,192.72. This sum was paid Idler by drafts of the Colombian Government on London. The associates were also paid the amount found due them, the payments amounting in all to $157,458.56.

Copies of these liquidations are also appended hereto. There was a fourth in 1829, attempted at Bogota by one Vargas, but as it seems to have been unauthorized, it needs only to be mentioned.

The two liquidations of 1824 pertained to the four accounts current.

Idler, it seems—just when the record does not reveal—but after his liquidation, added to his account some items of charge, unnecessary to be detailed, against the government on account of damages and correction of errors. These did not properly pertain to either of the four accounts current. The principal one of them was for $53,781.63, damages for alleged breach of contract in respect to Barinas tobacco, again to be recurred to.

These added to the balance—difference between liquidations—with interest, amounted in 1827–'28 to near $80,000. When President Bolivar was in Caracas in that year it would seem that the Idler and Ogden liquidations, with alleged "undue rebatements and substantial errors" of the latter pointed out, including the omission of an item for demurrage of $6,336, together with the damage item for the non-delivery of the Barinas tobacco, were laid before him. What resulted is certified by Clemente, May 13, 1833, the former Venezuelan plenipotentiary and agent, at Philadelphia, then a major-general in the Venezuelan army:

"I further certify that the President, Simon Bolivar, examined the said documents carefully, and decided that the claims should be paid at Bogota, where the General Treasury was; and His Excellency promised to see the said payments made in full, according to the contracts, * * * and ordered Mr. Idler to go to Bogota, for which city His Excellency himself started on the 5th of July, 1827. Mr. Jacob Idler also started for that city, and had it not been for the unfortunate events which destroyed harmony in the Republic, he then would have been paid."

It will be borne in mind the Intendant exercised his functions under and as "the natural and immediate agent" of the President. The latter's action, therefore, in treasury (as in other) matters had all the legal efficacy throughout the Republic which the Intendant's had in his own department.

Idler went to Bogota as directed in 1827. After some delay because of suits instituted against him by indorsees of the London drafts received for the Ogden balance, as above

stated, which had been returned protested (and on account of which his losses were heavy—one letter says three-fourths of the whole), he began the liquidation of his account.

Finding need for some documentary evidence which was at Caracas, he returned to that city for it in May, 1828. Soon after his arrival there, as it would seem, he was sued in the Prefect's Court by the treasurers of the Venezuelan Department for a balance of some $37,000, alleged to be due the Government because of over-payment at Bogota and of failure to receive credit for sums paid.

The record touching the institution of the suit, and the pleadings being meagre, much in this respect is left to inference. Idler, it would seem, set up his account showing the balance alleged to be due him as aforesaid, and asked its allowance and payment.

May 28, 1828, the following order was made in the case by the *Intendente* and his *asesor:*

"For the better settlement of this claim of Mr. Jacob Idler against the Government, and in order to render easier the study of its merits, bringing to it light and an intelligent consideration, Señores Vicente Aramburu and Elias Mocatta are hereby appointed referees. In case that both gentlemen should find themselves unable to agree, they shall have authority to appoint, upon consultation with this court, a third referee or umpire. The referees are hereby given the power to call for papers and documents, and to ask all other information needed, either from the Treasury, Mr. Forsyth, Mr. Idler, or Señor Santos Michelena, who was attorney for the latter at Bogota; and they are particularly recommended to make their report as early as practicable.

"Let notice of the above be given to Messrs. Idler and Forsyth."

Forsyth, the old agent, whom Idler had lately sued in attachment at Bogota, had promoted the suit.

Notwithstanding this suit Idler, who had been put under bonds of $40,000 not to leave Caracas till its termination, seems not to have given up thought of securing a liquidation still at Bogota through Bolivar. Accordingly he memorialized the President September 28, 1828, on the subject setting forth his balance then as amounting with interest to $81,386.

The Secretary of the Treasury replied November 5:

"His Excellency (President Bolivar) has directed me to say that the Government acknowledges the justness of your claim, but that the present circumstances of the treasury do not permit its payment. You are, therefore, to wait some time further in the assurance that very soon you will be paid."

Meantime the Intendant issued the following, dated October 23:

"I must for the sake of precaution declare the following: It is absolutely necessary that this Intendancy write communications and orders to the authorities of this city and of the ports of Cabello and La Guayra and to all authorities, civil, military, and of high police, not to permit his [Idler's] departure over the sea under any pretext whatever; further, to notify him personally not to absent himself from this city till the results of the pending operation with the government are known, and, finally, to give communications to the treasury of Bogota, and [of?] the state in which this affair is now existing, so that all liquidation and payment of his accounts be suspended."

This was followed by an order of the same officer, November 6, in these words:

"Mr. Idler is to be notified that he shall not absent himself without having secured the result of this law-suit."

No further attempt was made by the now defendant Idler towards securing his demand from Bogota.

On the 14th of January, 1829, the referees above designated, not having served, the Intendant entered this order:

"Let the record in this case be referred to the treasurers [there were two] with instructions to make an examination and liquidation of the accounts; the said examination and liquidation to be made with intervention of Mr. Jacob Idler and Mr. Samuel D. Forsyth."

The treasurers responded in the following report, and at about the time, it may be worth while to note, of Venezuela's declaration of secession and independence:

"*To His Lordship the Intendant:*

"In strict observance of your Lordship's decree of the 14th of January of the present year, on the examination and liquidation of the accounts of Mr. Jacob Idler and associates with this State, we have formed the annexed statement, having before us, for that purpose, the principal judicial proceedings together with all other annexed or connected therewith:

"It appears from the whole, that the aforesaid gentlemen have secured, over and above what was due to them by the several contracts entered into with this government, the sum of $37,795.22, as the same is evident by the

comparison between the credit and debit; for the recovery of which your Lordship will dictate such orders as you may think the most expedient. We must also remark, should the same hereinafter be necessary, that what this Treasury Department has done, has been established entirely on the documents that it has examined; from which it is inferred that there must be other former documents to refer to. In consequence of which we are of opinion that the whole proceedings must be sent back, together with everything done in the premises, to the first court where they took their origin, in order to rectify the first operations; Mr. Idler *paying or securing previously* what he lawfully owes. For by the said statement it is evidently proved that he has received the above said sum.

"However, your Lordship will please to direct whatever you may deem the most just."

The chief of the items, unnecessary to be enumerated, going to make up this sum was one for $21,285, relative to French muskets, to be explained further on.

Thus the issues were made up, each party having fully set out his account.

Thereupon, January 8, 1830, the Prefecture or Treasury Court ordered that—

"This case be delivered to Señor G. B. Sprotto, in order that he, as umpire, may *settle* the question arising out of the disagreement between the liquidation made by the Treasury and the liquidation made by Mr. Jacob Idler."

Seventeen days afterwards, Sprotto returned his award in writing in favor of Idler for $72,346.34, including interest at 6 per cent. to June 25, 1825.

The items of debit and credit, with the interest added as to each, were all set out and a balance struck. It would seem (see Letter of Council of Government, 1834, hereinafter referred to) that by agreement of parties the whole accounts were gone into irrespective of the liquidations.

Here it may be well to observe that Venezuela having separated herself from the rest of Colombia resumed her independence January 1, 1830. Her reorganized judiciary, under the constitution of September of that year, was substantially as before, with a Supreme Court of Justice added, consisting of a president judge, and three associates, with a fiscal or attorney-general. The Treasury Court was now to

be presided over by an officer learned in the law called *juez de letras*. Its judgments in treasury matters were required to be affirmed by the Superior Court *in consulto* before becoming binding.

On August 31, 1830, a short time before the Prefect was succeeded by the *juez de letras*, the Prefecture, in accordance with the prayer of the treasurers before quoted, entered this order:

"Upon consideration of the representations of the Auditors (contadores) let this expediente be forwarded to the Secretary (of the Treasury) in order that if it seems proper to the Government it may be sent up to the Commission of Bogota, so that, after examination of the documents appended thereto and of the observations made by the general Treasury and by the Tribunal of Accounts, the said Commission may again liquidate the amount of Messrs. Jacob Idler and his associates; and in the meantime let Mr. Idler give bonds for the $37,795.22 of the balance now standing against him, or let him file the original bills of exchange drawn in his favor against the English loan."

The order was not complied with, but, August 25, 1831, the Treasury Court confirmed Sprotto's award. Its action, objections to which had been filed by the treasurers, was disapproved and in July, 1832, José Cadenas was appointed and qualified as revising umpire. In September of the same year he filed his report of great length. Every item or point of difference was taken up and weighed, and his conclusion stated with reasons therefor. He found a balance in favor of Idler for $70,520.11½, including interest as before to June 25, 1825. Thereupon the following order was entered by the Treasury Court:

"Let the foregoing award be communicated to Mr. Jacob Idler and to the counsel for the State (Ministerio Fiscal), and if desired by them let also the record of the proceedings be communicated to them."

Both parties assented in writing to the entry of the award. No objection seems to have been made to it from any source. On *September* 18, 1832, that court rendered this judgment:

"Administering justice in the name of the Republic and under the authority of law, it is hereby declared that the public treasury is responsible to Mr. Jacob Idler for the said sum of $70,520.11½, which shall be paid him

in the manner and in the form that the supreme Government may determine upon. And the said Idler shall apply for the payment of the said amount to the said supreme Government, and file before it a copy of this decision."

And *on October* 1, 1832, the case being brought, in course, before the Superior Court, it, after reciting the foregoing judgment and the action on which it was based, adjudged as follows:

"Administering justice in the name of the Republic and under the authority of law, it is hereby declared and adjudged that the decision of the Treasury Court (brought up in consultation) is approved of and affirmed.

"Let the record be returned to the Treasury Court with the proper certificate."

Pursuant to the judgment Idler applied for payment. He was refused by the Secretary of the Treasury on the ground that the judgment was a nullity, the inferior courts having no jurisdiction of the case—only the Supreme Court of Justice being vested, under the constitution, with authority to try it.

Under a system there prevailing, this question was taken before the Supreme Court of Justice and decided adversely to the government, December 6, 1832. The court, on a review of the case from its inception, found and adjudged as follows:

"The Supreme Court, therefore, considering the stage reached by this case of liquidation of accounts, does hereby find and hold that the liquidation made *settles forever* this matter, and that there is no foundation of law upon which to base the plea of nullity for want of jurisdiction which has been set up, for the following reasons: First, because there has been no dispute about the validity of the contracts, which is the case in which, under No. 5, Article 147 of the Constitution, this Supreme Court could have exercised jurisdiction in the first instance; second, because both parties have consented to have the case settled as it was, without at any time having set up the plea of want of jurisdiction; and, third and last, because, under the said law of May 1st, Art. 86, the *juzgados de letras* have full and ample power to take cognizance of and decide all cases in which the treasury is interested, either as plaintiff or defendant;

"Whereupon, administering justice in the name of the Republic and under the authority of the law, it is hereby declared and adjudged that the pleas of want of jurisdiction and nullity raised by the executive should be, as they

are, overruled; and that the claimant has his right free to act as is proper in the condition of the case."

Resort by the Treasury was then made to the Council of Government, an advisory executive body of nine members embracing the Vice-President and members of the Cabinet. On March 1, 1833, it adopted this resolution :

"*Resolved by the Council*, That the Government be advised not to issue any warrant for the payment by the treasury of Venezuela of the sums which Mr. Jacob Idler has been adjudged to be entitled to recover, (but) to suspend the payment of the said sums, and to reserve the right of the said Jacob Idler to present his claim when the plenipotentiaries who are to be appointed to make the proper division or apportionment of the debt of Colombia shall have met and commenced their labors."

Again the case went before the Supreme Court of Justice to test the validity of this action, when on the 25th of April, 1833, it decreed that—

"No attention should be paid to the resolution," * * * "because otherwise the validity and strength given by law to the final decisions of the courts of justice of competent jurisdiction, upon full knowledge of the facts and the law of the case, and in faithful compliance with the precepts of law, would be weakened and destroyed."

Idler, still unable to secure payment, returned home after an absence of ten years, and applied to the President of the United States for relief.

Then began the diplomatic history of the case, not necessary to be gone into. Suffice it to say, almost every, if not every, administration from Jackson's to Grant's, contributed to it, under the almost constant stress of urgency by the contractors or their descendants.

Pending the representations of the American *chargé d'affaires* at Caracas, the Venezuelan Government applied, January 14, 1836, through a fiscal, specially appointed in the place of the regular fiscal for the occasion, to the Supreme Court of Justice for the benefit of the ancient remedy of *restitutio in integrum* in the Idler case; that is, for an order to annul the judgment and proceedings referred to so far as should be deemed beneficial to the government. It is proper

to note that in 1834–'35, the Government through its Council of Government and Treasury, had, without notice to Idler, addressed communications to the Supreme Court of Justice, on the subject, in criticism of the judicial action had, and in rediscussion of the questions involved and decided in the case. In one of these letters covering 67 foolscap pages, dated June 27, 1834, but not, it seems, transmitted till September, the court is told that its final decision of December 6, 1832, affirming the jurisdiction of the treasury court, "only proves that it never entered into the examination of the documents, nor gave due attention to so important a case." In another place: "In view of the result reached * * * no one could fail to attribute the lack of success to inattention or lightness of mind of the courts." Of this communication the fiscal *ad hoc* in his application to the court says:

"The analysis of the proceedings, which is found in the report of the Council of Government, transmitted to your Most Excellent Court on September 18th, 1834, was made upon examination of the judicial record, and of all other documents referred to by it, and it is so extensive, so correct, so methodic, and so enlightened in everything regarding the facts that the undersigned feels himself relieved from the necessity to report the results of the examination which he made by himself."

Two of the four judges of the court excused themselves from sitting in the hearing of the application—one because of his former action, the other for cause not stated. The two remaining judges filled their places by appointment from the Caracas bar for this case, February 1–5, 1836. The tribunal so constituted, on the 27th February, 1836, issued this order:

"Considering that, as it appears from the statement of the attorney *fiscal* applying for the benefit of 'restitutio in integrum' against the sentence of September 18, 1832, confirmed by that of October 1st of the same year, in virtue of which a balance is found in favor of said Jacob Idler against the State, it appearing from the proceedings that he is absent from the country, without anything having been said as to his earliest return, and that the resort appealed to constitutes a *new* action or instance in which he must be heard, let him be summoned through the *Gazette* in order that, within sixty days, he may appear in person, or by proxy under instructions or retainer, subject to the orders which may be called forth; and, without prejudice of what has been said, and not to delay the course of this busi-

ness, Dr. Felipe Fermin de Paul is appointed to temporarily act as attorney for him, keeping in mind that it appears from the record of the proceedings that this latter has counselled and assisted him in the *preceding* instance."

June 7, 1837, the Supreme Court for the case issued letters rogatory so-called to the United States District Court at Philadelphia,

"Requesting that notice be given to a certain Jacob Idler, residing in the city of Philadelphia (the son of Jacob Idler), that he be and appear by himself or by his attorney before the said *Supreme Court* of Venezuela at the city of Caracas, within seventy days, in *a certain suit* instituted or promoted against him by the fiscal attorney of the said Republic for the reversal or *restitution in integro* of a sentence or decree given in his favor and against the treasury of Venezuela.

The notice actually reached Idler only twelve days before the expiration of the time limited for his appearance, when there were no means of reaching Venezuela in time. He did not appear, or authorize any one to appear for him in the case.

The Supreme Court for the case rendered a decision, November 4, 1837, on said application, denying its allowance for want of original jurisdiction to grant the remedy. It held: * * *

"This Supreme Court has, therefore, reached the conclusion that the *right and power* to grant the remedy of *restitutio in integrum*, in the first instance, *does not belong to it.* Law 3, tit. 25, *Partida Third*, provides that the action, by which the nullification of a judicial decision, through the remedy of *restitutio in integrum*, is sought for, must be brought before the same judge who rendered the judgment. The *juez de letras* of this city was the one who rendered the decision against which the remedy of *restitutio in integrum* is now invoked, and the Superior Court was the court which approved that judgment.

* * * * * * * * *

"Whereupon, administering justice in the name of the Republic and under the authority of the law, it is hereby decided that the jurisdiction over this new action or incidence of *restitutio in integrum*, invoked by the lawyer acting as fiscal, belongs to the courts which rendered the decisions against which the remedy has been invoked (*corresponde á los tribunals que han librado las determinaciones que causan el reclamo*); and, therefore, let the record be returned to the Superior Court of the second district, a copy of this decision being left here. And let the proper notice be given to the Executive."

Following this, the Superior Court of Caracas, if the opinion of the Supreme Court for the case can be looked to by us under the circumstances as establishing the fact, rendered a decision—

"Granting the remedy of *restitutio in integrum* against the decisions of September 18th and October 1st, restoring the whole subject to the condition in which it was on the 31*st of August*, 1830, and condemning Idler to pay the judicial tax and a portion of the costs."

On appeal, the opinion recites, from this judgment of the Superior Court, taken by the attorney so appointed and joined in by the acting *fiscal*, the Supreme Court, on consideration, affirmed the judgment in these terms:

"In consideration of the above, administering justice, and under the authority of the law, it is hereby adjudged and decreed that the decision against which this appeal was taken is affirmed in every respect.

"Let the record be sent back to the court below, after a certified copy of the present decision is made and filed in the chancellor's office."

No record of the decision or proceedings of the Superior Court in this behalf has been presented to the Commission; nor has there been any showing or allegation of its loss.

It is said outside the record, that the Superior Court rendered its judgment December 20, 1838.

Twelve days after the action of the Supreme Court, the Council of Government "in compliance," to use its own language, "with this decree [that of August 31, 1830, before quoted], to the date of which the case has been restored," sent the case to the Colombian Commission sitting at Bogota, under the treaty of 1834, between Venezuela and New Grenada, for the adjustment of their affairs made necessary by separation.

The Commission returned it with the statement formulated by resolution and hereinafter quoted, adopted April 17, 1839, to the effect that it had no jurisdiction, and that nothing remained to Idler but to pay what he owed.

So ended the proceedings relative to the claim of Jacob Idler and associates before the Venezuelan courts, to be re-

sumed in the high court of diplomacy where the case had received comparatively little attention since 1836.

OPINION.

The case presents a number of questions which have been exhaustively and ably argued on both sides. Among them are:

How far are these judgments to be accepted as binding in the proceedings before us?

Was the court organized for the Idler case in 1836 a legal body; if not, were its judgments valid?

Did the remedy of *restitutio in integrum* pertain to Venezuela as to the Idler case? If so, did the proper court obtain jurisdiction in the premises?

Was the general effect of the proceedings in 1836–'39 a denial of justice? If so, should the judgment of 1832 be allowed to stand; or is it affected with fatal infirmities?

These questions will now be considered.

A State undeniably has the right to determine for itself through its own chosen media what its laws shall be, and what they are, and to administer justice within its own territory (subject, perhaps, to certain humanitarian principles not at all involved here); and its action is entitled to the respect of other States.

The Supreme Court of Justice, being vested with the judicial power of Venezuela, had and has the right to determine the jurisdiction, including its own, of the courts of that country and the state of the law pertaining to matters brought within their cognizance. And its decisions duly and regularly made are binding upon parties and privies, although citizens of another country.

A judgment duly and regularly made implies jurisdiction of the subject-matter and of the parties, and does not, in a government of law, involve a denial of justice, technically

so called. But it does not follow that one State will always enforce or give effect to the judicial decisions of another. Mr. Wheaton says:

"The most eminent public jurists concur in asserting the principle, that a final judgment, rendered in a personal action, in the courts *of competent jurisdiction* of one state, ought to have the conclusive effect of a *res adjudicata* in every other state, whenever it is pleaded in lieu of another action for the same cause.

"But no sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another state; and if execution be sought by suit upon the judgment *or otherwise*, the tribunal in which the suit is brought or from which execution is sought is, on principle, at liberty to examine into the merits of such judgment, and give effect to it or not, as may be found just and equitable. * * * A foreign judgment is *prima facie* evidence where the party claiming the benefit of it applies to the English courts to enforce it, and it lies on the defendant to impeach the justice of it, or to show that *it was irregularly* obtained. If this is not shown, it is received as evidence of a debt for which a new judgment is rendered in the English court and execution awarded. But if it appears by the record of the proceedings, on which the original judgment was founded, that it was *unjustly* or fraudulently obtained, without *actual personal notice* to the party affected by it; or if it be clearly and unequivocally shown by extrinsic evidence that the judgment has manifestly proceeded upon false premises, or inadequate reasons, or upon a palpable mistake of a local or foreign law, it will not be enforced by the English tribunals. The same jurisprudence prevails in the United States of America in respect to judgments and decrees rendered by tribunals of a state foreign to the Union" [Elements Int. Law, 205.]

Vattel lays down the rule that:

"When once a cause in which foreigners are interested has been decided in form the sovereign of the defendants cannot hear their complaints. To undertake to examine the justice of a definitive sentence is an attack on the jurisdiction of him who has passed it. The prince, therefore," adds the author, by way of qualification, "ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, *excepting in cases* where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made to the prejudice of his subjects, or of foreigners in general. * * * In consequence of these rights of jurisdiction the decisions made by the judge of the place within the extent of his power ought to be respected and to take effect even in foreign countries." (Law of Nations, Bk. 2, § 84.)

His editor, the eminent Mr. Chitty, thought it proper to add a note to this passage, as follows:

"This principle appears to be now settled by the law and practice of nations, *but, nevertheless, subject* to certain general wholesome rules, essential to be adhered to in order to prevent the effect of partial and unjust sentences and decisions."

An international tribunal, it is believed, should give the full measure of respect and consideration to judicial decisions in the states establishing it that each would give, under the public law, to those of the other.

Bearing these principles in mind, let us turn to the record of 1836–'39.

The first thing that engages attention is the organization of the court. That there is a facility of substitution as to judges in civil law courts not found in countries where the jury system prevails may be true. But such change is believed to be always regulated by law. We have not learned of any law authorizing the substitution of two members of the bar for two out of the four judges of the Supreme Court of Justice, made February 1–5, 1836, to try the Idler case. Why any change at all was necessary is not apparent. It is true one of the judges excused himself because of his former action in the old Idler case. But this particular question had not been before the court, either in the old case, or, it would seem, in any other, and of course the court had not acted upon it. And even if it had, that would seem to be a reason why the judges should sit here rather than decline. They were so much the better advised. What, if any, opinion they expressed in answer to the communications by the Government, in 1834–'35, on the subject does not appear. But it cannot be that a preconceived opinion of the law worked a disqualification in a judge in Venezuela, even as early in her judicial development as 1836!

The constitution of 1830, then in force, provided for the appointment of supreme judges and the filling of vacancies, as follows:

"ART. 146. The judges of the Supreme Court shall be nominated by the President of the Republic to the House of Representatives, three names be-

ing submitted for each place. The House shall reduce this number to two, and shall present the number thus reduced to the Senate, which body shall name those who are to compose the court. The same order shall be followed in filling vacancies; but if the Congress is not in session, the Executive Power, in concert with the Council of Government, shall temporarily fill the places until a selection is made in said form."

There was no other provision relative to their appointment or substitution.

On the 18th of May, 1836, *three months and a half after the change in the personnel of the court had been made*, a law was enacted by the Venezuelan Congress providing:

"ART. 14. Whenever any judges are absent, co-judges shall be appointed for each case or business by the remaining judges or judge, if the absence is accidental, and the selection shall be made from among the skilful members of the legal profession that may be in the place, and, in default of them, from among the persons living in the locality who possess the qualifications of Representatives in Congress; and where there is a regular vacancy, the selection shall be made by the Executive Power, and until the appointment of a regular incumbent."

But no appointment in the Idler case was made under this law, and none could have been had it been in force in February, as the regular judges were not "absent."

But to go back a little. On the 14th of October, 1830, the Constituent Congress, which formed the constitution of Venezuela, resolved that—

"The laws and decrees issued by the Congress of Colombia that have been in force up to the present time, and which may not be contrary to the constitution or laws sanctioned by this Constituent Congress, shall continue to be observed in the judicial order."

The law of Colombia then in force in "the judicial order" on this subject appears to have been embodied in the following parts of the judiciary act passed by the Colombian Congress April 13, 1825, to wit:

"CHAP. IV.

"*Of the Judges of the High Court and of the Superior Courts of Justice.*

"ART. 34. When, on account of death, resignation, removal, or any other cause, there should be a vacancy among the numbers of the High Court, the Court shall immediately apply to the Executive Power through its President, in

order that the vacancy may be temporarily or permanently filled pursuant to the Constitution. In the first case, the Executive Power will fill the vacancy within not more than six days.

"§ 1. In the cases of this article regarding the Superior Courts, these will immediately advise the Executive Power, through its President, that he may fill the vacancy temporarily, and the High Court, in order that it may propose to the Executive Power for a permanent appointment.

"ART. 35. *The Executive Power* will appoint temporarily those who are to act as substitutes of the judges and attorneys-general; not only in the cases of the preceding article, but also in those of sickness or absence exceeding fifteen days, and in those of suspension.

"§ 1. *These temporary and alternate appointments shall never be made in behalf of permanent fiscals*" (*attys.-general*).

"CHAPTER VI.

"*Provisions common to the High Court and the Superior Courts of Justice.*

"ART. 87. In the cases of disqualification, of disagreement of opinion among the judges, and in those of a challenge (of a judge) to complete the required number of judges, if there should be no magistrate qualified to act, associate judges will be appointed *by absolute majority of votes.*

"ART. 175. * * * The High Court and Superior Courts, the presidents of these tribunals, and the Superior judges shall not exercise other powers than those which are assigned to them, and the jurisdiction of these courts and tribunals shall be limited to the cases prescribed by this law."

It occurs to us to observe in respect of this act:

If it was in force in Venezuela in 1836–'37, under the resolution quoted, as seems to have been the case, the action of the Government in appointing (as was done) a temporary *fiscal* for the Idler case in the Supreme Court in place of the permanent *fiscal* was illegal, being in violation of the last clause of Art. 35.

The provision relating to the filling of places on the bench by *judges*, required for an appointment the concurrence of an "*absolute majority of votes.*" In the Venezuelan court a majority was *three*, whereas *two* made the appointments in the Idler case. As the Supreme Court for the case was not therefore constituted under this act, it is unnecessary to consider whether its provisions extended to such a case. It will be seen that under the Colombian law where the judges appointed, the integrity of the regularly constituted court could not be disturbed. Under the action had, it was otherwise.

The law therefore was not only not followed, but its principle was violated.

The act of May 18, 1836, was amended by an act of May 2, 1838, and that again March 23, 1841, and the cases in which substitutions might be made on the bench were defined with particularity. This fact is stated, in connection with the provisions referred to, in support of the belief that the courts in every detail of organization and for every contingency were regarded, and were, in fact, the creatures of positive law, both in Colombia and Venezuela. And how could it be otherwise in a government of law? If courts can be constituted unauthorizedly, so can the executive; so can the legislature. Constitutional government would thus be speedily ended.

Counsel for Venezuela, not asserting legislative authority for the appointments, seems, if understood, to regard this method of procedure as not new in common-law countries even, and instances the courts of assize under the statute of Edward I. But with high respect, it seems to us the analogy is wanting. The assizes, more nearly analogous to masters in chancery appointed for special purposes, sort of aids, as it were, to the courts at Westminster for collection of facts in cases pending before them and for other subordinate purposes, *were established by law*, not a law decreed for a particular case, but by a general law of the realm for all cases.

The difficulty is not that the court at Caracas was filled by members from the bar for this case, or that two judges made the appointments. But *that this was done without the authority of law.* If such a proceeding has a parallel in common law jurisprudence it has escaped our notice.

Venezuela could of course constitute her courts as she desired, but having established them, it was Idler's right, if his affairs were drawn in litigation there, to have them adjudicated by the *courts constituted under the forms of law.* There are instances where the action of tribunals presided over by *de facto* judges, acting under color of authority, has been upheld

upon satisfactory grounds, but we think the doctrine would not apply in such a case as this. If the Colombian law of 1830 was in force when the court was organized for the Idler case, as seems to have been the fact, the judges were prohibited from exercising any "*other powers than those which are assigned to them*," and as the power of appointment was not among those assigned *to the minority of the court*, the acts of the two judges in appointing the other two *ad hoc*, were not only not under color of law, but in violation of its express provisions. A body so constituted could not have legal validity. Its acts could not bind absent parties. They would be utterly void. Had Idler appeared, and consented to the jurisdiction of the improvised tribunal, a different aspect would be presented, and perhaps a different question.

But, for the purposes of this discussion, let us assume the legality of the court, without, however, subscribing to the doctrine that "*natural justice* has nothing to say against tribunals thus constituted."

Venezuela, to avoid the judgment in favor of Idler for $70,520.11½ in 1832, asserted, in 1836, her right, by succession from the Spanish King, to the ancient remedy of *restitutio in integrum*, and the Supreme Court sustained the assertion, so far as it had jurisdiction of the case.

By the Roman law a right was given persons during minority and for four years thereafter, on due application and hearing, to avoid contracts and transactions to which they became parties, or with which they were connected during their minority, and to be restored to all things lost thereby, when restoration was shown to be for their benefit. The right, taking its name, it would seem, from that of the writ under which it was enforced, and which succinctly defines its own meaning, was called *restitutio in integrum*. It seems not to have been a right attaching merely to the person, but

one inhering in the contract or transaction itself. It was assignable and descendible. It extended to judgments in civil and criminal cases. But we have not observed that it pertained to a judgment unless, also, to the cause of action on which it was based.

This right or benefit was at length extended to corporations, the church, and the king. But in all such cases application for its enforcement had to be made to the proper authority in due form within four years of the transaction to be avoided. There was one unvarying exception or bar to the enforcement of the right by one recently a minor, namely: "When, after having become of age, he either expressly or tacitly approved of the transaction." And it is believed the principle was of universal application wherever the right prevailed. An assent to the transaction once completed by a person enjoying the right and competent to assent was a bar to the remedy. (See Mackeldey's Roman Law, §§ 228 *et seq.*, and authorities cited.)

For centuries after the Roman Empire the right was recognized in civil law countries, among them Spain.

It was this minor's right or remedy which the Venezuelan Government sought wherewith to defeat the Idler judgment.

Were it our province and necessary to determine whether that royal prerogative passed from the Spanish king to the Venezuelan Republic, the very lucid arguments of learned counsel would, not improbably, render the task a comparatively easy one. But we do not feel called on to enter so comprehensive a field of inquiry. The question here is not so broad. Let it be conceded, for the argument, the right succeeded generally to Venezuela; it does not follow that Idler was affected.

A moment's reflection will show the benefit was not universally applicable to Venezuela's contracts, and that her courts were powerless to make them so. A contract or transaction subject to the right had implied in it a condition of defeasance and restoration at the option of the privileged

party. It was as though it had written in the body thereof that the minor, or king, or other favored person reserved the option to disaffirm and annul it partially or altogether, and have restored him all things lost or parted with on account thereof. Could such a right in Venezuela, however fully possessed by succession, affect her contractual or other obligations with other States? Had her treaties implied in them any such condition? And was the case in anywise different as to contracts with citizens of such States made therein, where the right was not in vogue?

These were North American contracts, made at Philadelphia, where the right did not obtain. When Venezuela, so to say, came there to enter into them, she came, as would Great Britain or any other person competent to contract, with not a privilege less, not one more. Her right of *restitutio* she left behind her. The Philadelphia contracts had no condition of defeasance implied in them. When sent to Venezuela for execution, none were added. No power there, judicial or other, could engraft it on them. Therefore, as to those contracts themselves, it is perfectly clear Venezuela had not the right of *restitutio in integrum*. Unless, consequently, the law was that the right pertained to judgments when it did not to their bases, these legal proceedings cannot be upheld, even if otherwise valid.

To assert such to be the state of the law is to say that Venezuela, as to the contracts, was an adult, full-grown and stalwart, but as to their enforcement, a—minor! Such a condition, under the ancient Roman law, would seem to have been an impossibility. While the minor's right might pertain to contracts and not to judgments upon them, it is not perceived how the converse could be. If the contract itself were for any cause without the scope of the law's operation, as, for instance, if it had been affirmed after majority, or the period had elapsed within which it could be assailed, of course a judgment then upon it must necessarily have been also without that scope. To hold that when the

minor's right was extended to the king a different rule applied, would be to affirm that in its transmission it received an important addition—underwent a material change in principle. The *onus* is upon him who asserts this to prove it. No intimation of the like from any authority or source has met our notice, unless the Supreme Court must be regarded as an exception.

But looking "through the gauze of mere words" to the substance of its decision interpreted in the light of practical results, it not only held that Venezuela possessed the royal remedy as to the former judgments, but as to the contracts on which they were based also; for, as we shall presently point out, its practical operation was to defeat both.

Had the courts jurisdiction as to subject-matter, *and* as to Idler, to render the judgments in controversy? If not, they were inoperative and void.*

If the proceeding was an "action upon the record," and not an independent suit, *inter partes*, the right of Venezuela (assuming her entitled to the ancient remedy) to institute the proceeding within the time limited cannot, we think, be gainsaid. It could not be defeated by Idler's absence. Any reasonable mode of notice in that case would be sufficient. The modes adopted would, in our judgment, be all that justice required.

But if the action was a separate and distinct one, its subject being merely a judgment instead of a contract, or other particular transaction, then it is just as clear to our minds that the service on Idler being beyond the jurisdiction of Venezuela was not sufficient to obtain jurisdiction of his person, and any judgment rendered against him in that case would be void.†

---

*Schibsby *v.* Westenholz, L. R., 6 Q. B., c. 155; Novelli *v.* Rossi, 2 B. & Ad., 757; Carleton *v.* Bickford, 13 Gray, 591; Kerr *v.* Kerr, 41 N. Y., 272. See also: Furguson *v.* Mahon, 11 Ad. & E., 179; Cavan *v.* Stewart, 1 Stark, 525; Vallee *v.* Dumergue, 4 Ex., 289.

†Bischoff *v.* Wethered, 9 Wall., 812; Pennoyer *v.* Neff, 95 U. S., 714; Hoffman *v.* Hoffman, 46 N. Y., 30; Davidson *v.* Sharpe, 6 Ired. L., 14; Board of P. W. *v.* Columbia College *et al.*, 17 Wall., 521.

Says Wharton, Law of Ev., 3d edition, § 803:

"A foreign judgment, as we have seen, is always impeachable for want of jurisdiction; and hence, for want of personal service, *within the jurisdiction*, on the defendant, *this being internationally essential* to jurisdiction in all cases in which the defendant was not domiciled in the state entering the judgment."

Whether, in this case, jurisdiction might have been obtained as to the *rem* by some process of attachment or garnishment, need not be discussed, for nothing of the kind was resorted to.

There is some doubt from the language of the court, February 27, 1836, just what its view was on this point. It said the "claim now made" was a "*new* action or instance" (*un nuevo juicio o instancia*). And it deemed the case of such a character as that Idler "must be heard," and directed him summoned.

The authorities seem to regard *restitutio* as a "new action."

Colquhoun, who may be taken as representative, says:

"Restitution must be prayed and a formal suit commenced in that behalf." (Roman Civil Law, § 1865.)

Again—

"Restitution may be sought by action or *by plea*, and *in the latter case* every judge is competent who has cognizance of the principal matter in dispute, whether he be commissary or umpire; in the *former case*, however, application must be made to the judge who is competent *in respect of the defendant*." *Ib.* (See Savigney, Private Int. L., 320; Bar, Int. L., 213–16.)

In the view taken, it may be parenthetically remarked, that if *restitutio* would not lie as against the Idler contracts themselves, their annulment could not have been accomplished by *plea* in the old case pending its conclusion; and this fact is an additional argument against a judgment on *such* contracts being assailable by this means.

The Spanish law and the civil law authorities cited by counsel for the United States, and not necessary to be quoted here, leave little doubt that with some exceptional cases—wholly variant from this one—where, "irrefragable cause being shown," the judge may *ex parte*, even *mero motu*, grant the

relief, the action had always been regarded and treated as an original one *inter partes*, to be brought and conducted as any other ordinary suit. And such indeed may be fairly inferred from the process and opinions of the Supreme Court, to have been its view.

Assuming the proceeding to have been an "action on the record," and the notice sufficient for all it purported to be, there remains the other question, namely: *Whether the action was brought in the proper court in time.* It is conceded all round, the Supreme Court expressly saying, that it must have been brought within four years from October 1, 1832. The Supreme Court had no jurisdiction of the case in the first instance, as it decided when it returned the record to the Superior Court, Nov. 4, 1837. There is some confusion arising from the decision as to whether the Treasury Court or Superior Court was held to be the one of original jurisdiction. But as no action was ever taken in the former, let us also assume the latter was the proper one. Was the suit begun there within the time limited? In other words, was the case of the Fiscal Attorney of the Republic against Jacob Idler brought and pending in the Superior Court of Justice of the Second District, on the first day of October, 1836? If not, there was no jurisdiction of the subject-matter. What evidence is there that such was the fact?

As stated before, there is no record of this proceeding from that court among our files, and no cause shown for its absence, if it ever existed. There are full records from it in the earlier case. Why not also in this later one? The existence of this record is challenged by counsel for the United States. How must it then be shown? In municipal tribunals a high character of proof is required for this purpose.

Foreign judgments, says the Supreme Court of the United States, referring to the law, "are authenticated (1) by an

exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate must itself be properly authenticated." Church *v.* Hubbart, 2 Cranch, 187.

In the same case it was held:

"A judgment certified under the private seal of one styling himself to be Secretary of State for Foreign Affairs is not evidence; also, that a translation of a foreign judgment certified by a consul, but not under oath, could not be received in proof of the judgment."

But "where the original judgment record was destroyed by fire, a copy of a judgment duly certified by the clerk of the court by whom the judgment was rendered, is proper evidence." Nash *v.* Williams (Cornet *v.* Williams), 20 Wall., 226.

It would not be contended by any one, we suppose, that the recitals of a record in one court would be received in a municipal tribunal to prove the existence and contents of a record, not shown to have been lost or destroyed, of another court.

It seems to us, in a case like this, the best evidence reasonably attainable should be required before an international tribunal.

The recitals of the Supreme Court do not come up to the mark, nor does the following, in its final opinion, February 22, 1839:

"A comparative study of the dates in which the judicial decisions herein referred to were rendered, and of the date of the petition of the counsel for the State asking for the writ of *restitutio*, will show that the remedy was resorted to, in due time, within the four years provided for by the 10th law, title 19, PART 6."

Had the court given dates so that a "study" of them could now be made, the difficulty would still remain, even though they disclosed jurisdiction in the Superior Court. They are not the best evidence. That is the record (unless shown to have been lost). If there never was a record then, in contemplation of law, the court did not act. It is elementary that a court of record (and this was one) speaks *only* through its record. *And even where that is produced*, showing on its

face jurisdiction, and the jurisdictional facts stated are denied, it has been held they may be inquired into and disproved.

The Supreme Court of the United States in Thompson *v.* Whitman, 18 Wall., 457, held:

"The record of a judgment rendered in another State may be contradicted *as to the facts necessary to give the court jurisdiction;* and if it be shown that such facts did not exist, the record will be a nullity, *notwithstanding that it may recite that they did exist.*"

In Pennywhit *v.* Foot, 27 Ohio St., 98, the court said:

"From a careful review of the numerous cases we find the rule now well settled that neither the constitutional provisions that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents any inquiry into the jurisdiction of the court in which a judgment offered in evidence was rendered, and such a judgment may be contradicted *as to the facts necessary to give the court jurisdiction;* and if it be shown that such facts did not exist, *the record will be a nullity, notwithstanding it may recite that they did exist*, and this is true *either as to the subject-matter or the person, or in proceedings* in rem, *as to the thing.*"

Such is the law in the United States, and, we believe, generally.

If a court's findings in favor of its own jurisdiction were conclusive in cases coming under consideration before international or other tribunals, the question of jurisdiction could never be raised; for its acting at all is equivalent to finding jurisdiction to act.

"An alleged judgment," says Dr. Wharton (Evidence, § 796), "is open to attack for want of jurisdiction; for it is a *petitio principii* to say that it is unimpeachable because it is a judgment, and that it is a judgment because it is unimpeachable."

The evidence satisfies us that the *restitutio* suit was not in the Superior Court till after November 4, 1837, when the Supreme Court "returned" *its* record in that regard thereto. The suggestion—for contention would be too strong a term—that the bringing of the suit in the Supreme Court, which was without jurisdiction to entertain it, was its commencement in the Superior Court for the purposes of avoiding a bar, cannot be entertained. It is sufficient to say that before allow-

ing an effect so extraordinary we should require to see the enactment providing for it, and none has been called to our attention or by us found. The Supreme Court makes no intimation that such is the law, unless the passage quoted can be regarded as such. But constructions involving results violative of familiar principles and courses of procedure, are to be avoided, and we cannot so regard the finding. The fact that the Supreme Court of its own motion sent the record down to the Superior Court does not help the matter, for it is immaterial whether the suit was begun there at its instance or not. The question is when and whether it was *therein* instituted.

The objection to this record is by no means technical. No notice, legal or other, was received or sent to Jacob Idler about the suit in the Superior Court, the only court having jurisdiction to entertain it in the first instance (unless it be the Treasury Court, where it never was), as is conceded on all hands. The letters rogatory directed him to appear in the *Supreme Court* in a suit instituted *there*. If the summons was legal, it only gave him notice of what that court *in that* case—not in another instituted in an inferior tribunal and subsequently appealed to it—might lawfully adjudge. The notice directing him, away in a distant land, to appear in one court when the business affecting his interests was to be done in another, was worse than none at all, for it was misleading. Even if no notice had been required, and one had nevertheless been given, whose tendency was thus to mislead, we are inclined to think the act, from the standpoint of justice, would vitiate the whole proceedings. Receiving the notice in 1837, at Philadelphia, that a suit had been begun against him in *restitutio* in the Supreme Court of Venezuela in June, 1836, he—charged at most with a knowledge of the law as it was declared to be—could well have said to himself, "I shall not undertake the hazards of a journey, or incur the expense, to appear. The court has no jurisdiction, and cannot grant the prayer of the Govern-

ment; and it is now too late to bring the suit in the court which had jurisdiction."

But, conceding jurisdiction of subject-matter and of the defendant, was the alleged judgment of the Superior Court (for what followed is inconsequential except as a consummation of a wrong begun, if wrong it was) binding?

The purpose and effect of the judgment may be judged by results. It set aside and annulled the old record back to the Prefect's order of August 31, 1830, before quoted, leaving that to stand in force. That order authorized (whether lawfully or not is now unimportant) the papers and record in the Idler case to be sent to the old Commission at Bogota, in order that "*said Commission* may *again* liquidate the accounts of Messrs. Jacob Idler and his associates." The Government at once sent the case away to a (now) foreign jurisdiction, to a new Commission sitting at Bogota under a treaty between Venezuela and New Grenada, of 1834, to adjust matters pertaining to the separation. Of course *it* was not the "said Commission" which could "again" liquidate the claim. It shortly answered, through the Venezuelan member, Mr. Michelena, by resolution, to wit:

"That the time within which Idler could have submitted his claim to the Commission of Liquidation *had expired on the 6th of August*, 1829, and that as the tribunals of Venezuela had no jurisdiction to make the said liquidation, the Commission considers itself without jurisdiction to take cognizance now of this matter, and that the last judicial action taken in Venezuela (*restitutio*) *cannot have other effect than to cause Idler to restore to the Venezuelan treasury what he unjustly received under the Colombian Government.*" [Report of meeting of Council of Government, Oct. 8, 1839.]

The effects the government attributed to the judgments are stated by its representative, Mr. Romero, to the American Minister at Caracas, July 8, 1840, reaching practically the same end, as follows:

"According to the last recent sentences of the Superior and Supreme Courts, dated December 20, 1839 [1838], and February 22d of this present

[past] year, the matter has gone back to the condition it was in on the 31st of August, 1830; that is to say, to the state of the new liquidation ordered by the Intendants Mendoza and Briceno [before August 31st], because it was at that stage that the judge of first jurisdiction [*Juez de Letras*] unduly retained for the first time [August 25, 1831] the expediente and *converted into a judicial and litigious proceeding, what* up to that time was treated as an *administrative and economic* question of the government.*

"Therefore, the government of the Republic is *disposed* to instruct the General Treasury and the tribunal of accounts to proceed *to the pending new liquidation*, which may be attended by Messrs. Idler and Company in person, or by their attorneys, within the time which will be assigned to them."

The Government thus interpreted the judgments as taking the case out of the hands of the courts, to be proceeded with in a non-judicial—*i. e.*, "administrative and economic"—manner before its own accounting officers of the Treasury, as it might be disposed to direct. That is, in effect, the Government proposed to decide the Idler case itself!

The litigation before the courts was put an end to, and thereby the contracts, in so far as they remained unfulfilled (if there were any), were for all practical purposes annulled; for the Government's action and reiterated opinion left no room for question what it would do.

We have seen *restitutio* could not reach these contracts. It is believed it never contemplated such results as to judgments.

The Supreme Court for the case knew—must have known—that the order of Aug. 31 was impossible of execution, and had been from the very day of its entry nearly 10 years before. Its affirmance of the alleged Superior Court judgment annulling proceedings back to that order, leaving it to stand, could have had but one purpose—to switch the case from the lines of judicial determination; in short, to dismiss it. We have no hesitation in saying the *effect* of these judgments was a denial of justice.

---

*It may be noted that this view of the law and character of the earlier proceedings was not entertained by the Supreme Court of Justice on appeal.

One reviewing this record, considering the communications about the Idler case addressed by the Council of Government and Treasury Department to the Supreme Court of Justice, before the application for *restitutio* was made, asserting the existence of the extraordinary remedy in behalf of the Government, notwithstanding its assent to the Cadenas award; the reorganization of the court so as to change its *personnel*, and the substitution of a temporary *fiscal* for the regular officer, for this one case, both too in violation of the Colombian statute extended still ~~so~~ to Venezuela; the fact that this was the first and the last time the Republic in its own behalf ever claimed a right to the ancient remedy, asserted in the right of succession from the Spanish king, when Spain had abolished it more than two hundred years before, except in a few cases among which the Idler case could not by possibility be classed; the final decree exactly in accordance with the prayer of the Treasurers, in their report of May 2, 1829, and the wishes of the Government; and the practical outcome, namely: *the ending of the litigation* and virtual extinction of the contracts so far as they were not yet satisfied;—one considering these things cannot, as seems to us, well escape the conviction that it was the voice of Idler's opponents which found expression in the judgments of 1838 and '39, and not that either of Justice or of the Supreme Court of Justice.

A foreign citizen in litigation with a sovereign before his own courts is entitled to no special favors; but even-handed, or, as Phillimore puts it, "ordinary justice," is his right in the eye of the public law. This Idler did not get. The "justice" attempted to be meted out to him, whatever else could be said of it, was certainly not "*ordinary* justice."

Our conclusion is, from the foregoing considerations, that the proceedings in *restitutio* were, as against Idler, and are, as against the claimants, a nullity. This is the best we can can say of them.

The judgment of October 1, 1832, standing as it does unaffected by the subsequent proceedings, will under the doctrine above quoted be upheld unless manifestly wrong.

But it is assailed. Grave charges are made against Idler and associates, which, if true, would disturb its basis. We have deemed it our duty to look into them with care so far as the record here enables us to do so, as well as to examine the objections otherwise urged against the judgment. The Supreme Court for the case, repeating in substance what the counsel of Government alleged, said in its final opinion:

"The most singular thing to be noticed in all that has been done in this case is the manner in which Mr. Idler himself has acted. Good faith, sincerity, and purity can never allow any creditor *to liquidate his accounts with two debtors at the same time*, even if the accounts recognize the double origin, unless the credits are divided. In the present case, Idler, *through his attorneys, liquidated his accounts at Bogota, and concealed the true and lawful price to be paid for the muskets*

"As some of his claims were disallowed there he came personally to this city and endeavored to liquidate again his accounts before the courts, and recover here what was denied him at Bogota."

As to the double liquidation:

The occasion for the two settlements was evidently a difference between Idler and his associates, dating back of 1823.

Duane, speaking of his failure to get the money on his liquidation, says:

"To my surprise, on presenting myself at the treasury, I was informed there was some difficulty. It was not precisely explained, and perhaps it was a false delicacy which prevented them informing me what I subsequently was told—that Messrs. Kneeland, the partners of Mr. Idler, had sent out a Mr. Elsworth with powers which so far rendered my agency inoperative. * * * It is not for me to narrate the scandalous intrigues and bad faith of Messrs. Bogart & Kneeland. This mission of Mr. Elsworth produced the effect of arresting the whole transaction and preventing my obtaining the whole amount of the liquidation." * * *

"It has been mentioned to me by Mr. Idler that the other parties in the transactions have alleged that I had been instructed by Mr. Idler to remit more than his share of money or assets had I received them, and he requests me to state the facts, which I cheerfully do. During the whole of the intercourse between Mr. Idler and myself, in conversation and in writing, he uniformly directed me to see remitted his own proportional part to him direct, and the rest to the associates in New York" (Document 86).

This shows a difficulty and its cause.

In May, 1823, Idler went to Caracas to effect a liquidation with the Intendant. And afterwards (date not given) the associates sent Ogden to Bogota. These were unmistakably independent movements. The power of attorney to Ogden did not purport to give any authority whatever to deal with Idler's interests.

The evidence leaves no doubt upon our minds that he had nothing to do with Ogden's mission till the liquidation was made; and it is altogether probable that neither Ogden nor his clients knew just what Idler was doing at Caracas. The facts intrinsically support this view.

That they were all alike interested to get the last cent due on the contracts allowed, goes without saying. What motive then could the associates have had in presenting, or he, in desiring or suffering them to present, a smaller claim at Bogota than he himself was urging at Caracas? If there were to be two presentations every interest conspired to make them alike, and up to the last dollar covered by the accounts under liquidation. That they were not alike is evidence of non-intercourse, of independence of action.

That such was known to be the relation and situation between Idler and his associates is shown by the address of the Council of Government sent the Supreme Court of Justice in September, 1834. On pages 51–2 of that document is the following:

"Said liquidator [Cadenas] ought not to have confounded with the account of Idler that of his ancient associates. From the 16th of March, 1822, the date of his cited instructions, he gave the order to his attorneys to separate his interest from that of his associates. These agreed likewise to the same (fol. 51 and over [not before the Commission]). In consequence of which Bogart and Kneeland named as their special attorney Henry Ogden, and Jacob Idler William Duane [this is a mistake, for Duane went out as the agent of *all* parties, Bogart and Kneeland paying him $300 in cash towards his expenses (see letter to Intendant, Nov. 5, 1822, and Doc. 86)], next Isaac Powles, and, finally, Santos Michelena. *Each one and all acted independently.*"

It may be inquired how there could be a difference in the

accounts, both parties getting their information from a common source—the contracts or books? In this way: Idler was the chief business man in the concern. He had the making of the contracts and supervision of the business. Naturally, he would have an intimate knowledge of detail surpassing theirs. It was this knowledge that enabled him reasonably to preserve to the firm what the others would have lost, and what would not always readily find its way upon the books. Take, for instance, the charge item of duty drafts in No. 4, Idler's liquidation, $24,340.54. He knew the discount should be 25 per cent. and procured the liquidation accordingly. The associates, through their attorney, took them at a twenty per cent. cut. Here he saved the firm $1,217. So with the item of 553 bales of tobacco in No. 2, he procured the liquidation at $5,419.42, when the government had charged and probably the Bogota liquidators allowed (though there is some uncertainty about it), $8,921. If our surmise be correct, he here saved over $3,500 to the firm. Then, again, his familiarity with the business would enable him to exclude unjust charges. In this way it is easy to see how the liquidations involving unsettled items, *made without concert*, one with a thoroughly informed party participating, and the other without this advantage, would necessarily vary. Only where there was collusion or concert of action would there be sameness.

But counsel for Venezuela undertakes to show that Idler's accounts liquidated at Caracas, November 21, are substantially those of Ogden settled at Bogota, December 31, 1824, barring a difference in discount and interest. It will be remembered the balance found due the contractors in the former was $164,763.89, and in the latter, as paid, $157,-458.56; difference, $7,305.33.

There are four accounts in Idler's liquidation, the *Elena*, the *Wilmot*, and the two *Endymion* invoices. In Ogden's there are two; that is, his No. 1 contains Idler's No. 1 and parts of his Nos. 2 and 3. Idler's No. 4 and Ogden's No.

2 are the same except a slight variance as to interest. So that the difference between the two aggregates, as is apparent on inspection of the liquidations, pertains to Idler's Nos. 2 and 3.

The learned counsel has apparently accounted for this difference, and established the identity of the accounts liquidated at the two places (brief, page 39).

His calculation shows the aggregate indebtedness, according to the Idler accounts, shorn of errors of discount and interest, to be $157,465.39, while those of Ogden stand at $157,458.57—only $6.82 between them, which is unimportant, as he says, "*De minimis lex non curat!*" But in Idler's liquidation, account No. 3, there are two items of credit to the Government, August 16, 1823, one of $1,465.56 and one of $12,385.33, amounting together to $13,848.89, and one charge item of $6,336, May 20, 1821, not to speak of others, not found in the Ogden settlement, which are entirely overlooked in, and left out of, his calculations and process of identification!

How Ogden's liquidation was made up in detail cannot be determined from the evidence sent us; because his No. 1 was formed, as expressly appears from the accounts, by resuming Duane's liquidation where it had reached the aggregate indebtedness of $92,702.93, without giving the items constituting such aggregate, and adding two, and only two sums, aside from interest thereto, namely, one for $291.20 paid Lemon in cocoa, and the other for $7,077.62 allowed for *Elena* loss (Idler's No. 1.) The demurrage item ($6,336), as appears from Duane's statement, was not included in his settlement, and the accounts on their face show the two credits ($13,848.89) were not considered at Bogota. So that no inference to support the charge of double presentation based upon the substantial identity of the accounts can be drawn.

As to concealment of price of muskets.

It is charged that Idler in the liquidation at Bogota "*con-*

ceaded the true and lawful price of the muskets," thereby being allowed $12 each therefor instead of $7.

This seems a strange accusation. How Idler, even if he had to do with the Ogden liquidation, which he had not, could be supposed to have *concealed* from the Government the knowledge of a transaction had with that Government itself and at its *demand*, is difficult to understand. The musket account was of more than three years' standing. For the Government to have it at all would be to have it with the reduction in price noted, that having occurred at the receipt of the arms in Venezuela, the Vice-President Soublette himself representing the Government in the matter.

But it is unnecessary to speculate. The proof is direct and unmistakable that the Board of Liquidation knew of this business two years before.

Duane, speaking of the progress he had made in securing a partial liquidation and a certificate therefor, says [Document 86]:

"I was proceeding to negotiate for the muskets, seeing the strong ground upon which I stood, and was assured by the *President of the Board of Liquidation* that no difficulty presented itself to my settling the *muskets and demurrage* DAMAGE ACCOUNTS."

That charge is the merest gratuity.

As to Idler's conduct before the courts at Caracas:

It is charged that Idler, failing at Bogota to have some of his claims allowed, went to Caracas and endeavored to liquidate *again* his accounts before the courts, and to recover there what was denied him at the former place. It would be difficult to put more error in as few words.

Idler's items in contention, except perhaps the single one of $291.20, a charge-back of an alleged error, so far as not allowed by them, appear not to have been before the Bogota liquidators at all. In February, 1825, he endeavored to have them brought before the Board, but was too late and it was not done. As for going to Caracas "to liquidate again

his accounts before the courts," the fact was otherwise, we might say oppressively so.

It was not Idler, but the public authorities who instituted the liquidation before the courts at Caracas. They *compelled* it. The counsel of Government, in the very communication sent the court, 1834, before referred to, say (page 6) on this subject:

"The affair was reputed concluded not only by the Government but likewise by all the associates, when, at the commencement of the year 1828, the Intendancy of Venezuela observed that the liquidation which had been made at Bogota * * * was on the one hand that Idler and associates were unjustly credited, and upon the other not debited or charged for various sums which had been received at the custom-house of La Guayra. *It was for this powerful reason that said Intendancy opened the subject to a continuation.*"

After the subject had thus, by the Government, been opened up "to a continuation," Idler did not object to going to Bogota. On the contrary, as has been seen, he wanted to go. The same communication says, page 11:

"Nor did Idler himself make any opposition at first that the documents should pass to the Government of Bogota, so that in his writing (folio 78) he only asks that this measure should be delayed until he could present other observations and documents which he solicited for the purpose. So that the *only objection made was his refusing to give the security which was demanded of him* that he might leave this city to make a new arrangement of his accounts at that capital."

What was the security required? Either that he give "*bonds for the* $37,795.22 *for the balance now standing against him*," or that he "*file the original bills of exchange drawn in his favor against the English loan.*" The bills he had sold, and he had been sued on them as endorser in Bogota. Their deposit was an impossibility to him. To have given bonds in a strange land for the payment of that sum of money was probably equally out of the question.

The order was practical prohibition to him. It has already been seen that before this, direction had been sent to Bogota by the Intendant stopping the liquidation there.

It seems from the same communication that he, being compelled to go into the subject—for the government itself

was attacking the Bogota liquidation—desired "*that this operation should be made anew*," and the *public authorities assented*.

Under the circumstances, how the complaint under consideration could have been made against Idler on any hypothesis of intelligence and just purpose, passes our understanding. The only alternative left him, short of suffering what he manifestly regarded gross injustice, was to liquidate and litigate the best he could in the Venezuelan courts.

It is said he received at Bogota sums that had been paid him at Caracas. It is a sufficient answer to this to say that every dollar paid at Bogota was credited on his account, which was adjudicated.

There is this appearance, however, of truth in the charges of concealment and double payment, that should be mentioned. There were two liquidations in fact. There were credits on Idler's that were not on Ogden's. Idler and the associates took, through their attorneys, all that was found due on the latter liquidation without deducting such credits. But it must be remembered that Idler rejected the accounting as incorrect and unauthorized. He evidently received the amount found in his favor as so much on account; and it may be reasonably supposed that when the associates learned of the considerable amount still claimed to be due not included in the liquidation and not known to them at the time, they received their payments as on account also. The Government could not be hurt if it received credit for all that was paid, as it did, especially as it did not regard itself bound by the liquidation, but consented "to have the case settled as it was."

It is charged that these later items were an afterthought; that had they been honest they would have been earlier presented. Not necessarily so. There had been long and vex-

ations delay about the payment of a substantially uncontested account current, with results of great hardship.

One can easily see that business prudence, under the circumstances, might have suggested the delay for a season of a claim for damages entirely well founded, so as not to be the occasion for further procrastination. The more probable reason for delay as to the Barinas tobacco claim is, that Idler hoped all along to get the tobacco. In fact, promises were made to him to that effect as late as 1824. Had they been fulfilled, of course there would have been no claim on this score. There is evidence, however, of an endeavor to procure the adjustment of these items before the payment of the Bogota liquidation, but it is unnecessary to pursue the matter.

It is sufficient, in fine, to say the evidence before us does not support the charges referred to against Jacob Idler.

There is another matter that should not go, perhaps, unmentioned. The Venezuelan Government said to the American Minister, in 1840, that there was corruption connected with the Idler judgments. But it made no specific charges, called to account none of its officers, or furnished any proof. The record is silent otherwise on the subject. Under such circumstances, this charge, never intimated during the long, weary progress of the case, is entitled to no consideration.

Turning now to the specific objections to the judgment:

It is said in substance that the judgment or claim was against the wrong party; that if any one was responsible to Idler it was Colombia and not Venezuela.

Undoubtedly the action was begun by the Colombian authorities, and had the point been made at the separation, what the action of the courts would have been can only be conjectured; but it seems not to have been made. On the contrary, the evidence transmitted shows, as one letter puts it:

"After their separation the Government of Venezuela went on with the suit more vigorously than ever."

It was too late after defeat, at the end of 1832, to make the question. It cannot be overlooked, in this connection, that, when it was supposed in 1840 the *restitutio* proceedings had cancelled Idler's judgment and restored in effect the Treasury liquidation against him for $37,795.22, which then with interest amounted to over $60,000, Mr. Michelena, the Venezuelan plenipotentiary at Bogota, expressed the opinion, *in which the Council of Government concurred*, that the *whole sum*, when paid in, would belong to Venezuela. Nor is it to be passed by, that the firm with which the same Mr. Michelena was connected, the Brothers Michelena of Caracas, having obtained in due course of business one of the drafts of the Colombian Government for £2,000 on London, with which Idler had been paid at Bogota, and which were returned protested as before told, brought suit thereon in Caracas against the Government of Venezuela, and on the 19th of December, 1831, obtained a judgment in the Supreme Court for $14,008, *which Venezuela promptly paid.*

In the course of the proceedings the *fiscal* said:

"When the State [which nominally was Colombia, but actually taken as Venezuela] or fisc enters into any agreement with private individuals, it is and must not be regarded as their superior, but as their equal, because a reciprocal contract equally binds all the parties according to the primitive and constitutional law of every reasonable society"—

a doctrine, had it been applied in 1836–'39, that would have saved this controversy.

It will be noted that Venezuela herein, through its courts and treasury, not only, as it would appear in effect, recognized her individual obligations in these transactions by discharging a bill growing out of them to which on its face she was not a party, but that in her refusal to pay Idler's judgment rendered less than a year later, made a discrimination as against a foreign citizen in favor of her own, a thing prohibited by the public law.

The reason given by the Government for this action, to wit, because, "when Venezuela made her last political transformation [1830] it [the bill] had been *radicated* in the Custom-House by the special order of the Government of Colombia, issued since the 26th of July, 1829," does not seem to us satisfactory, nor was it the ground on which a recovery was sought, nor that of the judgment of the court.

The suit was brought and the judgment and payment occurred after Venezuela's separation from the rest of Colombia, and before the adjustment of the latter's debt among the constituent states.

It has been held that conditions attached to a grant of land even by a prior sovereign, and which are inconsistent with the policy of an after-acquiring state, will not be enforced by such state. (United States *v.* Vaca, 18 Howard, 556.) It is not perceived upon what principle, in the absence of contract, an order of the Colombian Government to pay certain of its indebtedness from the revenues of a particular one of its ports would be operative *after* that port had passed into the hands of another state.

But waiving all these considerations and not insisting now on the doctrine laid down by Dana in his notes to Wheaton (Sec. 30, note 18), to wit: That where a state is divided each new state becomes liable for all the debts of the old one, as in case of union of states the consolidated community becomes responsible for the obligations of each constituent—was Venezuela liable as upon contract made by herself? She was not if her political existence became extinct December 17, 1819.

Let us look at this for a moment:

On the 15th of February, 1819, the Congress of Venezuela, convoked by Bolivar, was installed at Angostura. There were thirty deputies in the body, "nominated by the free part of Venezuela," twenty-six of whom convened and proceeded to organization and business.

On the 17th of December ensuing "*the Sovereign Congress of Venezuela*, to whose authority," using the language of the preamble, "the towns and people of New Grenada, recently liberated by the arms of the Republic, have voluntarily agreed to subject themselves," adopted the "Fundamental Law of the Republic of Colombia," so called, providing a scheme of government or constitution for the proposed State. Among its provisions were the following:

"1. The Republics of Venezuela and New Grenada from this day are united in one single State under the glorious title of the Republic of Colombia.

* * * * * * *

"4. The Executive Power of the Republic shall be exercised by a President, and in his absence by a Vice-President, both named, *ad interim*, by the present Congress.

"9. The Constitution of the Republic of Colombia shall be formed by the General Congress, to which shall be presented, *in the light of a project*, the one decreed by the present Congress, and which, together with the laws promulgated by the same, shall immediately be put into execution '*by way of an essay*.'"

General Bolivar, who had resigned to this congress his assumed dictatorship of Venezuela, and become, as he expressed it, "nothing more than a simple citizen," was designated by the body as President *ad interim* of Colombia and continued in the chieftainship of the military forces.

Francisco A. Zea, the President of Congress, by its authority, in promulgating "The Fundamental Law," January 20, 1820, issued a manifesto to the "People of Colombia," from which these extracts are taken:

"This work [that of union] so deservedly merited by you is already finished; your political concentration is verified and the fundamental law conferring it, and which, through me, Congress *offers* for *your supreme action*, will fulfil all your desires, will promote the interests of all, will cement upon an immense and lasting basis your independence, will establish that of South America, and make you a power both strong and solid."

Having portrayed in glowing terms the many advantages and possibilities of Colombia, he exclaims:

"But, alas! from what fatality, what cruel destiny is it that this country the first in the physical world, not only is not the first, *but does not even so*

much as exist in the political world. It is because you have not willed it; will it, and it is done. Say: 'Be it Colombia, and Colombia it shall be.'"

The recital in the preamble of the act that "the towns and people of New Grenada * * * have voluntarily agreed to subject themselves" to Congress, must be received as expressive of an anticipation rather than of a fact. In his report to Gen. Santander, vice-president and the chief civil magistrate of New Grenada, Dec. 31, 1820, the Commissioner of the Office of the Interior and Justice, speaking of the "Fundamental Law" of December 17, said:

"When this arrangement was communicated to Your Excellency, you immediately perceived the advantages and benefits accruing from it. Your Excellency foresaw that a union of forces, an accumulation of resources, must render us formidable at home and respectable abroad; *but you would not, however, risk a decree of obedience till you had consulted with the general authorities of the Department.* * * * This caution was very just and fitting for the consolidation of the association, which, as it contained a solemn fact, *required the free, express, and formal consent of all the contracting parties.*"

The representatives of the provinces, elected pursuant to the call of December 17, so published by Zea, met at Cacuta in May, 1821. To them at once Gen. Bolivar resigned the executive authority that had been conferred on him at Angostura, saying that "he held the presidency *ad interim from the Venezuelan Congress only*, and the Congress then assembled being that of Colombia, he considered his executive powers at an end."

On the 12th of July this Congress adopted the "Fundamental Law of the Union of the peoples of Colombia," parts of which are the following:

"We, the representatives of the *peoples of New Grenada and Venezuela*, assembled in General Congress, having examined attentively the Fundamental Law of the Republic of Colombia passed by the Congress of Venezuela in the city of St. Thomas de Angostura on the 17th day of December, 1819, and considering: 1. That united in one Republic the provinces of Venezuela and New Grenada have all the proportions and means of elevating themselves to the highest degree of power and prosperity. * * * 3. That profoundly impressed with these advantages all men of superior talents and patriotism have urged the governments of *the two Republics to agree* to their union. * * * In the name and under the auspices of the Supreme Being, we have just decreed, and we do decree the solemn ratification of the funda-

mental law of the Republic of Colombia, just mentioned, in the following terms:

"ART. 1. The *peoples* of New Grenada and Venezuela are united in a single National body under the express compact that its government shall be henceforth and forever a popular representative one.

"ART. 2. This new Nation shall be known and denominated under the title of the Republic of Colombia.

"ART. 8. The debts which the *two peoples have contracted separately* are recognized *in solidum* as the National debt of Colombia; and all the property of the Republic is responsible for its satisfaction."

The constitution for the new Republic, adopted August 30, differed radically from that proposed at Angostura.

This simple recital, we think, warrants and impels the conclusion that the act of December 17, 1819, while in its phraseology declaring Colombia then formed, was intended and understood to be, and from want of authority in the Venezuela Congress, could be no more than, a proposition (with tentative provisions) of union, between Venezuela and New Grenada, which was duly accepted by *both* provinces July 12, 1821, and the union consummated. Before this latter date, by whatever laws governed and in whatever name acting, each province preserved its legal autonomy and contractual powers. We are not saying that, for certain purposes or even generally, Colombia's existence might not be held to relate back. But we do say that for the purpose or with the result of defeating contracts with either province made before the consummated union in 1821, the political extinction of such province will not be held to relate back also.

On the question of fact whether Torres acted as the agent of Venezuela we see no good reason for finding differently from the courts. He signed himself, in his introductory communication with Idler, July 28, 1820, as the "agent of the Government of Venezuela." His powers were quite evidently in continuation of those of Clemente. He seemed to recognize that Idler had certain existing rights because of what had been done by his predecessor. For instance, without other allusion to the subject, he said in that letter:

"As the tobacco of Barinas is one of the most productive resources of the Government of Colombia, and the merchants of Holland are the best judges of this important branch of commerce, *I recommend to you* the Holland merchants as the best disposed to enter into the views of my Government."

Why should he recommend to Idler something about a particular kind of tobacco, unless by some existing arrangement Idler had to deal with it?

This, taken in connection with what Clemente said when the case was before the courts, August 12, 1830, becomes entirely intelligible, to wit:

"The contracts made and entered into between Idler and myself were as follows: First. To pay him for each musket twenty hard dollars, which was the price paid him for them at Montevideo. But afterwards we agreed to reduce it to only twelve hard dollars, if the Government should give him the monopoly of the Barinas tobacco until full payment of the contracts."

Otherwise it is obscure and apparently out of place. Before the passage quoted he says:

"On the other hand you are perfectly acquainted with the resources *as well as the present situation of the Republic of Colombia.*"

It was probably because of "the present situation" of Colombia that he signed as the "agent of the Government of Venezuela;" and also because of that "situation" that Idler would require the contracts to be made with Venezuela, although under the name of "Columbia." There was no doubt of *its* power to contract. The right of Colombia to do so was then contingent on what might occur at Cucuta.

While it was natural to point to the resources of Colombia as the probable paymaster (for the union was expected to take place in January after, less than a year), it was altogether business-like to conduct the transactions in the name of one unquestionably competent to contract. We think that Torres, therefore, did not subscribe himself as he did by inadvertence. He did it advised, and well advised at last.

All things considered, we think the objection to the judgment on the score that it was Colombia's debt, if any one's, is not here tenable. Nevertheless, under the Colombian act of

assumption of debts aforesaid, and under the general public law, Colombia became unquestionably liable for Venezuela's contracts. This did not free the latter, however, beyond the pleasure of her creditors. The making out and presenting of the accounts against Colombia is not important. There was no other Government then to present them against.

It is said the associates were not made parties, and are not entitled to share in the judgment. This, at least, is a technical objection. If the debt was owing, it seems of little importance, before the bar of international justice, in whose name the suit was conducted, so the right ones get the proceeds. Had the associates been made parties, we cannot see that the result for that reason would have varied. Idler always recognized their interest in the claims and judgment, and it is not apparent how the question now is material.

At any rate, objection comes too late. As said by the Supreme Court of Justice, December, 1832, "both parties have consented to have the case settled as it was," and questions as to forms of procedure are of little moment. Moreover, of the near $38,000 alleged over-payment at Bogota, Idler's share was only about $9,000; yet he was sued individually for the whole sum. He answered, recovering over $70,000. Venezuela is not now in a position to allege that the suit was wrongly cast. Had she stood by the Ogden liquidation there would be more reason for this claim, but she did not. She repudiated it. She cannot now hold the associates thereto. It was alleged in argument, supported by references to the record, that the contracts were all, in fact, in the name of Idler. But they are not before us, and we predicate nothing on this ground.

The contest in the case finally narrowed down to some five or six items, four of which formed the basis for nearly the whole of the judgment, and these only shall we notice.

The Government objected to the allowance of the loss on account of the *Elena*.

The circumstances connected with this loss are not revealed by the evidence submitted to us. The Council of Government said in their communication of 1834, that it was occasioned by seizure of the vessel by the United States Government at the instance of Spanish authorities for violation of neutrality laws. Informal inquiry at the State and Naval Departments has failed to elicit any facts on the subject. The statements before us are to the effect that the loss was occasioned by the Venezuelan agent, Gen. Clemente, and that the Government, recognizing its obligation to make it good, agreed with Idler to the amount in 1820. These statements stand uncontradicted, and we see no good cause to differ with the courts in respect thereto.

The Council of Government fell into a singular error of fact in supposing this claim was not liquidated and allowed at Bogota. It will be found by reference to the liquidations in Ogden's No. 1, the original amount agreed upon being $7,087.62.

The item may be regarded in the light of one agreed to and paid.

The charge of $6,336 for the detention of the *Endymion*, at Angostora, for 198 days from November 3, 1820, was resisted. There does not appear to have been objection to the rate of charge, $32 per day, nor question as to the date the schooner got into port, or as to the time she remained unloaded. The controversy seemed to turn—though the matter is involved in much uncertainty—upon the meaning of the term "arrival" in the contract. The referee said:

"Arrival of the vessel has never meant anything else than the moment of the vessel's having entered the port. If the arrival of the vessel would or could mean the same as ability to make the delivery of the cargo, as the Secretary of the Treasury understood, the claim might be made also that it means the day in which the delivery of the cargo was completed. Nothing of this is correct. The day agreed upon was the day of arrival; and whatever is said for the purpose of changing the date is in violation of the contract."

The contract is not here, nor is any evidence preserved, if taken, as to the matter. There is nothing before us upon which we could base a dissent from the view the courts took.

The issue about the musket item of $21,285 arose in this way: The 4,360 French muskets, being the last shipment under the contracts, were objected to after arrival at La Guayra as not being according to contract.

The agents of the contractors, Lemon & Forsyth, agreed with the Vice-President to allow all to go at the reduced price of $7 each, except 103, which were to be paid for at the usual figure of $12.

The Bogota Commission allowed $12 each for all.

The question turned upon the authority of Lemon & Forsyth to agree to a reduction from $12 to $7. Idler denied their authority, asserting they were, as their power of attorney known to the Government showed, mere receiving and delivering agents, and claimed the agreement was that all goods were to be inspected and accepted in the United States before shipment.

The "diploma" above quoted from contained this provision:

"It being understood that we [Venezuela] shall abide literally by whatever they [agents] may have agreed to, without entering into any inquiry or examination, or making any remarks or objections on or to the contracts made by them."

Gen. Clemente's certificate, in testimony, contains this statement:

"The contracts made and entered into between Idler and myself were as follows: * * * Second. That the conditions of the diploma under which I and my successor acted were that all the contracts for supplies made by us in the United States should be finally ended and admitted and liquidated there, and that no alteration or reduction of these terms should ever be made by any authority of the Venezuelan government, it being understood that the articles and effects to be shipped by us were to be examined and received there by us to our satisfaction, as so indeed they were examined and received."

It fairly appears that Lemon and Forsyth were only receiving and delivering agents.

There is also evidence to the effect that these muskets, at the instance of the Venezuelan agent, were examined by a French officer in the United States and pronounced good arms and were accepted, though of different sizes and second-hand in part. It is historically true that at this time the republic was in great need of fire-arms. Agents were dispatched to other countries for them. The slaves had been given their freedom and were being armed. So scarce were guns that soldiers sometimes went into battle armed only with pikes. It is not improbable under such circumstances that Torres would accept almost any character of arms rather than get none.

The statement that the arms were to be inspected and accepted in the United States bears the impress of truth in itself.

The idea that a business man of Philadelphia would send military supplies by the cargo to the seat of war in that country, there to be inspected and perchance thrown upon his hands, borders upon the absurd.

The facts above stated were not contradicted in the evidence, so far as disclosed here. If we were required to find upon the same question, we should, with the evidence before us, find with the Board of Liquidation and the courts that the agreement for reduction from $12 to $7, each musket, was unauthorized on the part of Lemon and Forsyth, and that the liquidation should be made at the former figure.

There remains to be considered the Barinas tobacco item of $49,160.00 as finally allowed. Idler claimed his original contract provided for the payment of $20 each for muskets; but that subsequently the agreement was reached to reduce the price to $12, in consideration of the government giving him the monopoly of the tobacco grown in the province of Barinas, and known as an article of superior quality, until full payment should be made for all the goods bought; and that it failed and refused to carry out this contract—sell-

ing others the tobacco while he remained unpaid, to his damage, $53,781.63. Remembering that indigo, cotton, cocoa, tobacco, &c., produced in Venezuela, were sold or disposed of by the Government, and formed a part of its "resources" at that time, we call attention to these sentences in the diploma:

"All of the said contracts which the said agents or Commissioners may make, or enter into, are beforehand approved of by us as made and entered into in use of the full unrestricted powers and faculties given them by us, faculties and powers which authorize them to deal and stipulate in the name and in behalf of the Republic, *and to mortgage her property and her revenues and resources.* The said property, revenue, and resources *shall be pledged with absolute preference to the payment of the debts contracted by virtue of this authority.*

Also to this clause in the "instructions:"

"*Fourth.* They are empowered to grant the contractors who may take to our ports the above-said elements of war, all the advantages that may be deemed just, relative either to preference in the payment, *or to the choice of the particular kind of articles produced in the country*, or to the amount being credited to set off customs duties."

It will bear repeating in this connection, that Gen. Clemente, in the certificate referred to, says the contracts made between Idler and himself provided:

"First. To pay him for *each musket twenty hard dollars*, which was the price paid him for them at Montevideo. But afterwards we agreed to reduce it to only twelve hard dollars, *if the Government should give him the monopoly of the Barinas tobacco* UNTIL FULL PAYMENT *of the contracts*, * * * and that the amount to be paid Mr. Jacob Idler was to be paid in Venezuela *with preference to any other debt*, and in hard dollars, IF *there was no Barinas tobacco.*"

In the part of the evidence which was before the courts transmitted us (and it would seem to be but a small part) there is corroboration of Clemente's evidence, and no contradiction thereof. The contracts themselves as to particular lots not being here we are unable to say whether they contain any modifying provisions. The Council of Government in its said communication of 1834, expressed the opinion that the delivery of such tobacco under the four

several contracts, "never was considered as absolutely necessary," and enter into an argument, quoting brief portions from the contracts in support of that opinion.

But a careful examination of the argument fails to discover to us the correctness of its conclusion. For instance, with respect to the first contract considered, it says (italics ours):

"With respect to the amount of the contract by the brig *Meta* [*Elena*], according to folio 32, *articles* 3 *and* 5 *are decisive.*

"The first of these articles says: The Government *offers* to pay the balance (all it owed) of 7,067.62 Spanish dollars at the expiration of six months, in ready money or in whatever property of the Republic the creditor (in default of money) should prefer it. The other article, 5th, says: The Government *wishes* aud *permits* that the sum which is in virtue of the article 3d, of this contract, if it is declared due, can be received as payment made for export and import duties."

Even from these fragmentary portions of the contract (and it gives no other), it would seem that if the *offer* in article 3 was accepted, Idler, "in default of money"—and there was default—had the right to select the product of payment, which, of course, would have been the Barinas tobacco as being the most desirable.

Article 5 is merely permissory in its terms and effect, and so far from being, in connection with article 3, "decisive" of the question at issue as the Council supposes, it is as we view it irrelevant. The rest of the argument, even upon its assumption of facts, seems to us with all due respect equally inconclusive.

Now, that the Government had the Barinas tobacco to dispose of every year from 1820 on, the evidence leaves no room to doubt; and that it refused to let Idler have the crops is equally free from question.

The truth is, that after pledging the crop to Idler, it pledged it in London to secure Government loans there, as letters from London brokers of that time among the papers show.

The Congress of Colombia by an act of 1822, expressly pledged the "resources" of the Republic to the payment of

the foreign loan authorized by it, in preference to all other debts, and a subsequent act on this subject, 1823, specially named tobacco as among the resources so pledged; both in derogation of the obligations to Idler under the "diploma" and "instructions." So that he was effectually cut off from realizing under his contract, although hopes were still held out to him for the "next crop" by the Intendants.

There was then a plain breach of contract on the part of the Government, so far as the evidence before us discloses.

What was the measure of damages? Idler claimed $8 a musket, the amount of reduction, would, in strictness, be his due. There were over 11,000 muskets in the last three shipments. His claim would thus exceed $88,000. That was not allowed him. Some half-dozen merchants were called on for their estimates. They computed his losses at about the sum allowed, perhaps a little over. There is no other testimony on the subject. The Government offered none, so far as appears. While this sum seems to us large, yet we are unable to say its allowance was manifestly wrong.

It had passed the judgment of two referees, amply authorized to take testimony, and, therefore, presumably thoroughly advised, and had received the sanction of the Treasury judge and the Superior Court; besides having the concurrence of the Government itself, through its fiscal's written consent to Cadenas' award, through the failure of the treasurers to appeal, and by the direct approval of Bolivar himself.

We have carefully examined the other contested items—comparatively small—going to make up the judgment, and fail to see in any of them a satisfactory reason for refusing its recognition as an entirety.

It will be observed that the decision of the Treasury Court, which, under the law properly dates from its confirmation, Oct. 1, 1832, is:

"That the public treasury is responsible to Mr. Jacob Idler for said sum

of $70,520.11½, which shall be paid him in the manner and in the form that the Supreme Government may determine upon."

There is no allowance of interest from June 30, 1825, the date to which the referees computed it. There was a considerable sum of compound interest in the award. It may have been for this reason interest after 1825 was not included in the judgment. At any rate, such is the judgment; and we are unable to say it is palpably wrong, either for what it contains, or may seem to omit.

We have carefully considered the arguments in favor of computing interest up to the date of the former award, and then allowing interest on the amount from such date. There is much force in the views presented where former awards are re-found. But we feel that course may not be warranted by the interest provision of the treaty, which reads:

"And in the event of interest being allowed for any cause and embraced in such award, the rate thereof and *the* period for which it is to be computed shall be fixed, which period shall not extend beyond the close of the Commission."

But one period here appears to be contemplated, ending at some time before the close of the Commission. To constitute *two* periods, thereby augmenting the interest, would at least be of doubtful authorization. The failure to embody in the treaty Mr. Frelinghuysen's understanding is rather an argument against the view urged than in its favor. Treaties are prepared with deliberation and care. Neither the omission nor insertion of material matter can be ascribed to inattention. (*The Nereide*, 9 Cranch, 419.)

An entry can be prepared allowing the claimants the amount of the judgment of the Superior Court, $70,520, omitting the odd cents, with 6 per cent. interest, that being the rate named in the contracts, from its date, October 1, 1832, to September 2, 1890, inclusive, less the deductions provided by the treaty on account of payments made on the old award, the same to be distributed as per the agreement on file dated March 17, 1868, subject to mesne transfers of certificates according to intervening petitions filed in this case.

(*Idler's Liquidation at Caracas, November* 21, 1824.)

No. 1.

The Government of Colombia in current account with Jacob Idler and his associates.

DEBTOR.

1820. March 5.	To value of invoices for certain war supplies furnished under contract entered into with General Lino de Clemente at Philadelphia and shipped on board the brig "Elena," then transferred to the brig "Eugene," afterwards called "Meta," a transaction which was finally consummated at Angostura on the 5th of March, 1820, on the one side by Juan Bautista Della Costa, as attorney for Mr. Jacob Idler, a merchant of the city of Philadelphia, in the United States, and on the other side by José Rafael Revenga, Secretary of the Treasury, payment to be made according to the contract	$8,457 62
	Sum	$8,457 62

CREDITOR.

1820. March 5.	Cash paid Juan Bautista Della Costa in partial payment of certain merchandise delivered to the Government, said Della Costa being Mr. Idler's attorney	$1,380 00
	Balance	7,077 62
	Sum	$8,457 62
March 5.	Balance due	$7,077 62
1824. Nov. 21.	Interest on the above from September 5, 1820, to November 21, 1824—4 years, 2 months, 16 days—at 6 per cent. per annum, according to the contract	1,788 29
" "	Amount due to date	$8,865 91

Errors or omissions excepted.

JACOB IDLER.

CARACAS, *November* 21, 1824.

No. 2.

The Government of Colombia in current account with Mr. Jacob Idler and his associates.

DEBTOR.

1820.
May 22. To value of invoice of certain war articles shipped on board the brig "Wilmot," delivered this day at Angostura under contract entered into on the one side by Jacob Idler, of the United States, and on the other by Manuel Torres, the agent of the Government in

	the United States, dated in Philadelphia, April 6, 1820, to the payment of which the Barinas tobacco was pledged, and the Government binding itself to pay in *round* coin (hard dollars) if there was no tobacco, as it appears from the contract No. 5	$63,071 50
	Sum	$63,071 50
1821.		
Oct. 4.	Interest on $38,933.50 from March 11, 1821, to October 4, 1821—six months, twenty-three days—at 6 per 100 per annum	$1,317 07
Oct. 4.	Interest on $2,000, as per item on creditor's side, from March 11, 1821, to October 4, 1821	67 70
1822.		
Oct. 1.	To interest on balance due October 4, 1821, $33,022.60, until October 1, 1822, eleven months, twenty-seven days	1,964 83
	Sum	$66,421 10

CREDITOR.

1820.		
June 11.	Cash paid on account of the cargo of the brig "Wilmot"	$22,136 00
1821.		
May 1.	Cash received to-day, balance of receipt given at Angostura June 19, 1820	2,000 00
May 1.	Cash which ought to have been paid with the first instalment	2 00
July 4.	To 553 bales of tobacco, of inferior quality, received at La Guayra, gross weight 50,180 pounds, at $10.80 per *quintal*	5,419 42
July 4.	To 24 bales of Barinas tobacco, of inferior quality, gross weight 2,234 pounds, at $22 per *quintal*	491 49
1822.		
July 1.	Balance	36,372 20
	Sum	$66,421 10
1822.		
Oct. 1.	Balance of foregoing account	$36,372 20
1824.		
Nov. 21.	Interest on the above from October 1, 1822, to November 21, 1824—two years, one month, and twenty days—at 6 per 100 per annum	4,667 78
	Balance	$41,039 98

Errors or omissions excepted.

JACOB IDLER.

CARACAS, *November* 21, 1824.

No. 3.

The Government of Colombia in current account with Jacob Idler and his associates.

DEBTOR.

1820.			
Nov.	3.	To value of cargo sent by the "Endymion" to Angostura under contract made by Jacob Idler, of Philadelphia, on the one side, and Manuel Torres, agent of the Government of Colombia, on the other side, at the city of Philadelphia, on August 18, 1820, to be paid as follows: Exclusively in Barinas tobacco, but if there is none, in hard dollars, as per contract	$72,639 93
1822.			
Oct.	1.	Interest on half of the above sum, or $36,319.96, from November 3, 1820, to this date, or 23 months, 1 day, at 6 per 100 per annum	4,182 85
"	"	Interest on the second half of the same sum from May 3, 1821, to October 1, 1822, or seventeen months. On this date—that is, October 1, 1822—the present account was presented to General Soublette, and pronounced by him correct	3,087 20
1821.			
May	20.	Demurrages of the schooner "Endymion" at Angostura from November 3, 1820, to May 20, 1821—that is, 198 days, at the rate of $32 per day—as per account presented	6,336 00
1822.			
Oct.	1.	Interest on the above from May 20, 1821, to October 1, 1822, or 16 months and 13 days	520 61
			$86,766 59
Oct.	1.	Amount due on this date	$86,766 59
1823.			
Aug.	16.	Interest on the above sum of $86,766.59 from October 1, 1822, to August 16, 1823, or 10 months and 15 days, at 6 per 100 per annum	4,555 23
		Sum	$91,321 82

CREDITOR.

1822.			
Oct.	1.	Balance due on this date, as per account presented to His Excellency General Soublette and found by him correct	$86,766 59
1823.			
Aug.	16.	To 60 bales of Barinas tobacco, received from General Soublette, amounting in clipped coin to 1,674.93, which, being reduced to hard dollars at 12½ per 100 discount, make	$1,465 56
Aug.	16.	To amount received from the Intendant in drafts on the La Guayra custom-house.... $18,050 00	
		To discount of 15 per cent. in place of 35 per cent., allowed on $7,000 to equalize that amount with *macuquina* 1,050 00	
		$17,000 00	

	To $18\frac{1}{3}$ per cent. on $7,000, to make the aforesaid *macuquina* equal to hard dollars	$1,283 33		
	To $33\frac{1}{3}$ per cent. on $10,000 for loss upon the drafts and *macuquina*	3,333 33		
			4,616 66	
				12,383 33
1823. Aug. 16.	Balance due on this date			77,472 93
	Total			$91,321 82
Aug. 16.	To balance due this date			$77,472 93
1824. Nov. 21.	Interest on the above from August 16, 1823, to November 21, 1824—15 months and 5 days			5,875 02
	Balance due to date			$83,347 95

JACOB IDLER.

CARACAS, *November* 21, 1824.

No. 4.

The Government of Colombia in current account with Jacob Idler and his associates.

DEBTOR.

1821. Oct. 4.	To 4,360 French muskets, arrived on this date at La Guayra under contract of September 21, 1820, to be paid half of the amount thirty days after this date and the other half six months after this date, with interest at 6 per 100 per annum, at $12 per musket	$52,320 00

CREDITOR.

1821. Oct. 20.	To 428 *fanegas*, 3 pounds, of cocoa, received on account, at $16 per *fanega*, in clipped coin	$6,848 96	
	Do., do., in drafts, to be used to pay a fourth part of duties on imports in the La Guayra custom-house	24,340 54	
		$31,189 50	
	Less 25 per 100 of loss or depreciation in the drafts and difference between clipped coin and hard dollars	6,085 13	
			$25,104 37
1821. Nov. 4.	Balance due		27,215 63
			$52,320 00

1821.		
Nov. 4.	Balance due on this date	$27,215 63
1824.		
Nov. 21.	To interest from April 4, 1822, to November 21, 1824, on the above balance of $27,215.63—two years, seven months, and seventeen days—at 6 per 100 per annum	4,294 42
Nov. 21.	Total balance due to date	$31,510 05

Errors and omissions excepted.

JACOB IDLER.

CARACAS, *November* 21, 1824.

I, Juan de Escalona, of the Order of the Liberators, a Brigadier-General, and the Intendant of this Department, do hereby certify that I have examined the foregoing account of the Government of Colombia with Mr. Jacob Idler for 4,360 French muskets, and I have found that its charges agree with the prices and terms of the original contract I have had before my eyes, and that the items on the credit side also agree with the certificates issued by the respective officers, which I have also had before me. For these reasons I judge the said account to be correct, just, and well made: and, at the request of Mr. Jacob Idler, I have issued the present certificate, at Caracas, this 7th day of February, 1825.

J. DE ESCALONA.

[NOTE.—A like certificate of the Intendant Escalona is appended to each of the other three accounts, with the possible exception of the first.]

(*Ogden's Liquidation at Bogota, December* 31, 1824.)

(No. 1.)

BOGOTA, *December* 31, 1824.

This Commission having seen and examined the documents presented as to the amount which Mr. Henry Ogden, agent of Messrs. Bogert & Kneeland, demands as what belongs to them for *three-fourths* of the account liquidated in *Expediente* No. 6, for Mr. William Duane, agent of Mr. Jacob Idler, upon contracts which he made with Mr. Manuel Torres, agent of the Republic, for himself and in the name of his associates, the gentlemen before named, it declares that the following items result in favor of said gentlemen against the Republic:

	Interest from January 1, 1822, to December 31, 1824.	Interest to end of December, 1821.	Principal.
For 92,411.73 pesos charged by the party interested as balance of 92,702.93 pesos resulting from the liquidation heretofore made for Mr. William Duane as agent for Mr. Idler, deducting 291.20 pesos for 18 fanegas and 26 pounds of cocoa, at 16 pesos, which Mr. W. P. Lemon admits that he had received over and above the 428 fanegas 6 pounds charged to him by the custom-house at La Guayra, the whole of which amount proceeds from articles of war delivered at Angostura; and it having been provided by the Supreme Government that this Commission shall make the liquidation and distribution of the proportion which belongs to the gentlemen associated with Idler, whom Mr. Ogden represents, being three fourth parts, there results in behalf of the said gentlemen an item of 69,308 pesos $7\frac{5}{8}$ reals, and on account of Mr. Idler 23,102.77 [pesos].	.....	.....	69,308.$7\frac{5}{8}$
For 4,448 pesos $7\frac{6}{8}$ reals, three fourths part of the interest at 6 per cent., as expressly stipulated, running from their respective dates to December 31, 1821, belonging to the said associates, and to Idler 1,496 pesos $2\frac{4}{8}$ reals	.....	4,488.$7\frac{6}{8}$	
For 12,610 pesos 1 real for the three-fourths part of interest due to the said gentlemen from January 1, 1822, to December 31, 1824, because of 6 per cent. annually arising to the party interested from 1822 by the liquidation for Duane, in addition to the above.....	12,610.1		
For the item of 7,077.62 pesos, which represent the 8,847 pesos sencillos acknowledged by the Commissioners at Angostura in favor of			

	Interest from January 1, 1822, to December 31, 1824.	Interest to end of December, 1821.	Principal.
Mr. Jacob Idler for materials of war which he sold to the Government, as appears by the *vale* signed by Mr. Henry Ogden, agent of Messrs. Bogert & Kneeland, to whom belong, as their three-fourths part, 5,308 pesos $16\frac{1}{8}$ reals, and to Idler 1,769 pesos $3\frac{3}{8}$ reals	.....	.....	$5,308.1\frac{1}{8}$
For the three-fourths of interest at 6 per cent., as agreed on, belonging to said gentlemen, accrued from September 5, 1820, to the end of December, 1821, 420 pesos $4\frac{3}{8}$ reals	.....	$420.4\frac{3}{8}$	
For that incurred from January 1, 1822, to the last of December, 1824, 955 pesos 3 reals	955.3		
For 2,238 pesos 4 reals, interest at 6 per cent. on the amount, 74,617 pesos $1\frac{3}{8}$ reals, to which foregoing items amount, from January 1, 1825, to June 30 of same year, as resolved by the Government	2,238.4		
By the foregoing adjudication and liquidation there result in favor of Messrs. Bogert & Kneeland the amount of items aforesaid	.....	.....	$74,617.1\frac{3}{8}$
For interest to the end of December, 1821, 4,909 pesos 4 reals	.....	.....	4,909.4
Interest accrued from January 1, 1822, to June 30, 1825, 15,804 pesos $5\frac{3}{8}$ reals	.....	.....	15,804
Which items added amount in all to 95,330 pesos $5\frac{3}{8}$ reals	.....	.....	$95,330.5\frac{3}{8}$

(Signed)

(No. 2.)

BOGOTA, *December* 31, 1824.

This Commission having seen and examined the documents presented by Mr. Henry Ogden, showing the amount which, as agent of Messrs. Bogert & Kneeland, he demands from the Republic for their part of the total value of the guns sent from North America for the use of Colombia, under the contract between Manuel Torres, agent of that Government, and Mr. Jacob Idler, for himself and in the name of his associates, it declares that the following items result in favor of said gentlemen against the Republic:

	Interest to the 31st of December, 1824.	Principal.
For 52,320 pesos, value of 4,360 guns delivered at La Guayra October 14, 1821, at the price of 12 pesos, in virtue of the contract above referred to, made September 21, 1820, upon which amount have been credited the following sums: 6,848.96 pesos fuertes for 428 fanegas 6 pounds cocoa, at 16 pesos fuertes, and 24,340.54 pesos in *vales* for one-fourth of the duties, which, being *macuquine* money, when reduced to fuertes are 19,472.44 pesos, and make in all 26,321.40 pesos; which deducted from the charge of 52,320 pesos leaves of the principal 25,998 pesos $4\frac{2}{8}$ reals to be divided between Messrs. Idler and his associates in the proportion of five twenty-fourths for Idler and nineteen twenty-fourths for his associates, Bogert & Kneeland, in accordance with which there is due to these the amount of 20,582 pesos $2\frac{2}{8}$ reals, and to Idler that of 5,416 pesos 2 reals, all being proved by the documents in the *expediente*	.....	20,582.$2\frac{2}{8}$
For 4,235 pesos $1\frac{2}{8}$ reals of interest accrued from October 14, 1822, six months after the delivery of the guns, as expressly stipulated for, at 6 per cent. as agreed upon, until December 31, 1824, which amount being divisible between Messrs. Idler and his associates, there belongs to these for their nineteen twenty-fourth parts, 3,352 pesos $7\frac{1}{8}$ reals, and to Idler 882 pesos $2\frac{1}{8}$ reals	3,352.$7\frac{1}{8}$	
By the foregoing adjudication and liquidation there results in favor of Messrs. Bogert & Kneeland on account of the above item of 20 582 pesos $2\frac{2}{8}$ reals	.....	20,582.$2\frac{2}{8}$
Interest to the end of 1824, 3,352 pesos $7\frac{1}{8}$ reals	.....	3,352.$7\frac{1}{8}$
Which items being added amount to 23,935 pesos $1\frac{3}{8}$ reals.	.....	23,935.$1\frac{3}{8}$

(Signed)

(*Michelena's Settlement.*)

BOGOTA, *June* 30, 1825.

This Commission having seen and examined the documents presented and filed in the archives of the liquidated foreign debt, Nos. 39 and 42, it thence determines the part belonging to Mr. Jacob Idler, now demanded from the Republic by Mr. Santos Michelena, as agent for the said Idler, and declares that as adjudicated and liquidated the following items result:

	Interest from January 1, 1822, to December 31, 1824.	Interest to the end of December, 1821.	Principal.
1.—Value of 4,360 guns sold to the Government, amounting to 53,220 pesos, from which sum being deducted 26,321.40 pesos, received by the parties interested, in a *vale* for discount of duties, and 428 fanegas 6 pounds of cocoa, there remained 25,998 pesos 4⅜ reals that was liquidated, of which belonged to Messrs. Bogert & Kneeland, as appears by *Expediente* No. 39, nineteen twenty-fourth parts, and so is left for this liquidation to Mr. Jacob Idler, for his five twenty-fourth parts, 5,416 pesos 2 reals, as appears from the said *expediente*....	.....	.....	5,416.2
For 1,044 pesos 6 reals of interest incurred from April 4, 1822, six months after the delivery of the guns, under the express stipulation of 6 per cent., to June 30, 1825.....	1,044.6		
2.—For balance resulting from the liquidation in *Expediente* No. 42, amounting to 92,702.93 pesos, from which amount having been deducted 291.20 (value of 18 fanegas 26 pounds of cocoa received by the parties in interest over and above the 428 fanegas 6 pounds above mentioned, in La Guayra) remain 92,411.73 pesos, of which amount a liquidation has been made as to the three fourth parts belonging to Messrs. Bogert & Kneeland, so that there remain, for the one fourth part of Mr. Jacob Idler, 23,102 pesos 6 reals, all of which appears from *Expediente* No. 42, above cited.....	.....	.....	23,102.6
Interest on the last amount at 6 per cent., as stipulated, from the respective dates that appear in the *Expediente* No. 6 of William Duane, to December 31, 1821, 1,496 pesos 2¾ reals.....	.....	1,496.2¾	
That accrued from January 1, 1822, up to June 30, 1825, 4,851 pesos 4 reals	4,851.4		
3.—For 8,847 pesos sencillos, value of various war material sold to the Government, as acknowledged by the Commission at Angostura,			

	Interest from January 1, 1822, to December 31, 1824.	Interest to the end of December, 1821.	Principal.
in favor of Mr. Idler, as is shown by the *vale* that appears in *Expediente* No. 42, which being reduced to pesos fuertes make the sum of 7,077.62 pesos, of which three-fourths belonged to Messrs. Bogert & Kneeland, leaving for this liquidation in favor of Mr. Idler 1,769 pesos $3\frac{2}{8}$ reals			1,759.$3\frac{2}{8}$
Interest at 6 per cent., as expressly agreed upon, from September 5, 1820, to December 31, 1821, 140 pesos $1\frac{2}{8}$ reals		140.$1\frac{2}{8}$	
That accrued from January 1, 1822, to June 30, 1825, 371 pesos $4\frac{3}{8}$ reals	371.$4\frac{3}{8}$		
By the foregoing adjudication and liquidation, results in favor of Mr. Jacob Idler against the Republic for the said particulars, 30,288 pesos $3\frac{2}{8}$ reals			30,288.$3\frac{2}{8}$
Interest to end of December, 1821, amounts to 1,636 pesos $3\frac{6}{8}$ reals			1,636.$3\frac{6}{8}$
Same accrued from January 1, 1822, to June 30, 1825, 6,267 pesos $6\frac{6}{8}$ reals			6,267.$6\frac{6}{8}$
Which items, being added together, amount in all to 38,192 pesos $5\frac{6}{8}$ reals			38,192.$5\frac{6}{8}$

(Signed)

Claim of

JOHN DONNELL'S Executors
v.
THE UNITED STATES OF VENEZUELA. } *No.* 3.

HOLLINS & MCBLAIR; FRANK HOLLINS, Administrator,
v.
THE UNITED STATES OF VENEZUELA. } *No.* 4.

[July 14, 1890.]

FINDLAY, for the Commission :

These claims were consolidated at the argument, and having been finally submitted after a long delay, for which the claimants are not responsible, will now be considered and determined.

In the latter part of April, 1812, say about the 26th, there arrived out from Baltimore, at La Guayra, two schooners, the *Eleanor* and the *Speedwell*, the former belonging to John Donnell & Sons, and the latter to Hollins & McBlair, both of them shipping merchants, residing in Baltimore, and all of them citizens of the United States. These schooners were laden with flour, the *Speedwell* carrying 539 barrels and the *Eleanor* 480 barrels. Of the cargo of the *Eleanor* 40 barrels were for the account of the captain, and the remaining 440 for her owners. Of the cargo of the *Speedwell*, part was for account of Hollins & McBlair and part for William Hollins, also residing in Baltimore, and a citizen of the United States. The respective proportions owned by each is a matter of no moment in the present inquiry. Of the whole lot of 539 barrels, 19 were rejected as not up to sample, according to the contract, presently to be noticed, leaving 520 barrels which were accepted. These, added to the 480 barrels shipped by the *Eleanor*, and belonging, as before stated, in the proportions of 440 to John Donnell & Sons and 40 to the

captain of the schooner, made up a lot of 1,000 barrels, which was disposed of by the following contract:

(Translation.)

"We, the undersigned, citizen Pedro Eduardo, on the one side, and citizen Gerardo Patrullo, of La Guayra, consignee of the American schooners *Eleanor* and *Speedwell*, on the other side, have covenanted and agreed as follows:

"1st. I, citizen Pedro Eduardo, do hereby purchase from Patrullo, the consignee of the above-named schooners, one thousand barrels of Baltimore flour, equal in quality to contents of the barrel which has been chosen to serve as a sample; and I shall give in payment for the same two quintals of green coffee of first quality for each barrel, as follows:

"2d. The flour shall be delivered to me either on land or on board, as I may decide; and the import duties and the unloading expenses shall be at the seller's charge. I shall deliver the coffee on board in canvas bags (sacos de lienzo), duties and expenses thereon being at my charge, half within thirty days and half within forty.

"3d. I, citizen Gerardo Patrullo, in the name of the respective American masters, assent to the sale of the one thousand barrels of flour, and to the delivery thereof on land as set forth, and also to receive on board the 2,000 quintals of green coffee of first quality, and no other coffee, in canvas bags, as stated in the foregoing articles. And we both agree to comply with, and to fulfil in every respect, this agreement, entered into in good faith, and executed in duplicate at La Guayra on the 23d of May, 1812."

"(Signed) GERARDO PATRULLO,
"*Consignee.*
"(Signed) PEDRO EDUARDO,
"*Commissioned by the Government for the purchase of flour.*"

It will be observed that this is not an ordinary contract of sale in which the price of the thing bought is expressed in dollars and cents, or other denomination of money, but it is a contract by which one product is to be exchanged for another; that is, two quintals of coffee for every barrel of flour. The price at which the coffee is to be rated per pound or per the quintal or one hundred pounds is not fixed in the contract, but the flour is to be delivered duty paid, and the coffee is to be put free on board within the time prescribed; this was thirty days from date of contract for one-half of the coffee, and the balance in forty days. According to the plain terms of this contract, Venezuela bound herself by

her commissioner to deliver in exchange for this flour two thousand quintals of coffee. The flour, which was then on board ship, was delivered, and 500 barrels were shipped to Puerto Cabello, on the 29th of May, June 8th and 9th following, and an order was given for the transfer of the remaining 500 barrels, on the 5th of June, to the provision store-house in Caracas. It appears that only 70,940 pounds, or 709.40 quintals of coffee, were delivered in exchange by Venezuela, leaving 129,060, or 1,290 quintals and 60 pounds, still due. This appears by a protest made by Patrullo on the 28th of July, 1812, in which he also apportions, for some reason of his own, the amount of coffee which should go to the masters of the schooners, upon a principle of division which cannot be reconciled with the respective rights of the parties. For one would naturally suppose that the schooner *Speedwell*, which carried the 520 lot, would, on any just principle of apportionment, receive as much more as this number was in excess of the 480 lot carried by the *Eleanor*. But Patrullo reverses this method, and out of the whole lot of 70,940 pounds received, allows 43,114 pounds to the *Eleanor* and only 27,286 pounds to the *Speedwell*. He protests, however, on the date mentioned, for the balance of the coffee undelivered, and also for $20 a day for demurrage PAID to each of the vessels, and paid, as we understand the protest, by him. With the exception of some correspondence between his principals in Baltimore and himself, after his return to the United States, this protest of Patrullo, on the 28th of July, 1812, is the last we hear of this claim until the 4th of April, 1835, when the matter is brought to the attention of Mr. Forsyth, then Secretary of State, in a letter written by Mr. William Hollins. In the interval, however, it appears that Patrullo had returned to the United States, and in a letter from Philadelphia addressed to Messrs. William Hollins and Hollins & McBlair, on 25th June, 1814, had informed these gentlemen, as well as John Donnell & Sons, that the balance of their claim for this flour had been satisfied, nominally,

by a deposit of Venezuelan paper money, of little or no value, under an order issued by the Spanish Government, which had gained the ascendancy in Venezuela a few days after he had made his protest. This deposit, he says, made on account of Messrs. Hollins & McBlair and William Hollins, amounted to $7,041.75, and on account of John Donnell & Sons to $6,346.04. In reply to an inquiry from them whether this might not be considered payment, he answers in the negative, for the reason that coffee was to be given in exchange, and therefore the claim would be good for the flour, notwithstanding the deposit of paper money which, as he says, was to be received back by Venezuela.

Whether they were satisfied at the time with this statement of their agent or not, or how far they differed from him as to the legal effect of this deposit, we have no means of ascertaining, but we do know, as far as the record discloses, that no effort was made to press the claim upon Venezuela until it was brought to the attention of the Secretary of State in 1835. It is true that during this interval the affairs of Venezuela were in the most disturbed condition; that from the latter part of July, 1812, with the exception of a year, down to 1820, the loyalists, as the Spaniards were called, had possession of her capital, and administered the government, and that from 1819 to 1829, during her connection with the Colombian confederacy, there would have been great difficulties in the way of presenting the claim. At the same time, by information gained from the papers in another case pending before this tribunal, we know that the task would not have been impossible, for we find that Mr. Jacob Idler, of Philadelphia, from the year 1823 down to the year 1833, carried on a protracted liquidation and litigation in all the courts of Venezuela, from the highest to the lowest, in an effort to establish a claim for muskets supplied to the patriots, and finally succeeded in obtaining a judgment in his favor. It not only appears that the claimants did nothing to bring these claims to the attention of the Venezuelan

government during the interval mentioned, but the papers show that William Hollins, on the 2d of December, 1824, by letter addressed to Mr. Adams, then Secretary of State, solicited the aid of the United States in recovering money due from Venezuela on another distinct and separate claim for muskets. To reconcile the apparent improbability of the coexistence with the musket claim of another claim for flour arising about the same time and between the same parties, which was omitted or overlooked by the claimant in his appeal for the aid of his government, an explanation was offered, plausible enough, but not sustained by the facts as we find them disclosed by the papers. This explanation was that William Hollins had a separate claim against Venezuela for muskets, and was jointly interested in the flour claim with Hollins & McBlair, and the letter to Mr. Adams was intended to solicit the intervention of the United States in behalf of the claim which he individually represented, and might naturally omit, therefore, any allusion to the joint claim without subjecting the omission to any injurious inferences such as have been suggested.

But it is a concession in the case that William Hollins was interested in the flour claim; indeed, according to his statement, was the only person interested in the claim; and admitting, now, for the purposes of the argument, that Hollins & McBlair had no interest in the musket claim, yet, still, how can we account for his silence as to the flour claim, upon the assumption of its being an existing *bona fide* claim, and that he was, at the date of his letter to Mr. Adams, fully apprised as to all the circumstances affecting the history and character of the claim. Upon this assumption, it is inexplicable why he did not unite both claims in his request for intervention. Moreover, in the letter from Patrullo from Philadelphia, before referred to, it appears that a statement of account was enclosed, showing what was due William Hollins, and Hollins & McBlair on both flour and musket account, and this statement is endorsed in the handwriting of William Hollins, as follows:

"Acct. of what remains owing by the Govt. of Veneza., on acct. of contract for muskets and flour per *Speedwell*, received from G. Patrullo in his letter dated Philadelphia, 25th of June, 1814. The flour was taken by the Government for its use."

The balance, as computed in this statement to be due on both musket and flour account, is $7.041.80, and this is the precise amount, with a difference of *five* cents, which Patrullo deposited in paper money on account of both William Hollins, and Hollins & McBlair, to cover all claims due at the date of the deposit, which was made on the 31st of March, 1813, after which time there were no transactions between these parties and Venezuela.

By an endorsement on the letter to Mr. Adams, it appears that the enclosures in that letter, among which was included the musket contract and a statement of what was paid on it, and of what was still due, were returned to Mr. Hollins, at his request, so that the last knowledge we have of these papers traces them into his possession. They are not filed with the papers in this case, and there has been no evidence offered as to their contents, with the exception of some statements in the correspondence of Patrullo, from which it would appear that some $7,000 were due on account of what would appear to be the musket contract on the 7th of June, 1812.

The petitions as presented by the different interests representing the original claim of Hollins & McBlair for flour alone ask for an award of $9,660.88, based upon the amount alleged to be due on July 28, 1812, the date of Patrullo's protest, with interest. This amount is ascertained by computing the quantity of coffee due at the rate of $12.00 to the quintal, and the result of the calculation is to make the claim for flour alone greater by $2,619.08 than the balance which, by William Hollins' indorsement on Patrullo's statement of account, was declared to be due for both musket and flour account.

To explain this obvious discrepancy one of the learned counsel in the case, Mr. John S. Blair, in a brief recently

filed, has suggested that this indorsement in a certain aspect of the case was a mistake, and that in another it would be reasonable and fair to accept the sheet of paper on which it was made, as only one-half of the paper or papers containing the statement of account; that there were, in fact, two accounts—one concerning the flour and the other concerning the muskets—and that the paper containing the musket account is missing, and the indorsement having been made on the paper containing the flour account is therefore misleading. But there is nothing in the appearance of the papers to indicate such a separation or to suggest the probability of there being a missing sheet, and that we should be asked or expected to go into such conjectures, only affords another illustration of the difficulty, we may say the folly, of attempting to fight against time in the great cause of composing human controversies in which that formidable opponent has always been, and will likely continue to be, by a weapon all his own, the successful champion.

It is also to be observed that William Hollins in his letter to Mr. Adams, making claim for the muskets within about ten years after the receipt of the account from Patrullo, which was endorsed by Hollins at some time, the date of which does not appear, states the amount due for the muskets as $7,041.80, which is the precise amount ascertained by his endorsement of Patrullo's account as being due on both flour and muskets, and tallies to five cents with the amount deposited by Patrullo in paper money as covering all the claims of William Hollins, and Hollins & McBlair on all accounts up to the 31st of March, 1813, since which time, as before remarked, they had no dealings with Venezuela.

Such being the state of the accounts with reference to a claim which originated in a transaction of barter between the parties in 1812, how can we ascertain with reasonable certainty what was due William Hollins and Hollins & McBlair on account of the flour claim? It seems from the papers and correspondence between them and Patrullo, and by

the statement of account endorsed by William Hollins, that there were numerous transactions between them and Venezuela of which the sale of the flour constituted only a part, and that Patrullo was their agent in conducting these transactions. It would protract this opinion too much to go into these matters and accounts at large, but it appears sufficiently to satisfy us that either the balance of $7,041.80 must be accepted as the only balance due to them on all accounts, or the claim must be rejected altogether for want of certainty.

Patrullo, on the patriots regaining their supremacy in Venezuela in 1820, sailed to Philadelphia, in the United States, where he appears to have lived until the time of his decease in the year 1832. By an arrangement made with his executors, Messrs. Donnell & Sons, and the other claimants got possession of his papers, which for the first time, it would seem, disclosed the full history of the flour contract consummated with Eduardo in the spring of 1812.

The United States having entered into diplomatic relations with Venezuela in 1835, by accrediting Mr. Williamson as its minister or Chargé at Caracas, a correspondence with the Secretary of State was at once opened by the claimants, with a view of presenting their claims, but curiously enough, while, in the letter of William Hollins to Mr. Adams before alluded to, reclamation is solicited on account of muskets, and muskets alone, nothing being said about flour, now that the claims of Hollins & McBlair and William Hollins are revived under the stimulus of a possible settlement, it is flour alone, and not muskets, which constitutes the exclusive burden of William Hollins' complaint to Mr. Forsyth. There is but one explanation of this apparent contradiction and that is to be found, although it is offered of course as conjecture in the fact that in 1824 William Hollins did not understand the true state of the accounts between the firm of Hollins & McBlair and himself and Patrullo, and that he only became possessed of this information partially after the latter's death by obtaining access to his papers by agreement with the executors.

On no other hypothesis is it conceivable how a man having two good claims against a foreign government in 1824, should invoke the aid of his own government in behalf of one of them only, not even mentioning the other, and eleven years afterwards, nothing by way of payment or satisfaction having been received in the interval, should solicit the same aid in behalf of the claim not mentioned in the first instance to the entire exclusion of the other. It looks as though Patrullo had made the Messrs. Hollins & McBlair believe that there was no hope of payment for the flour, he having a strong motive to do so, as will appear in the course of this opinion, and that they then abandoned the claim and took up the claim for muskets, and then afterwards learning by Patrullo's papers, or induced by them to believe that the flour had been forcibly appropriated by Venezuela, concluded there was a better chance of obtaining redress for this claim as a tort, and so in turn abandoned the other. It will be observed that Donnell & Sons made no claim until after Patrullo's death, and this is only explicable on the theory that they had been made by him to believe that there was no ground for the claim, he having the same motive, which will presently appear, for keeping them in the dark as to his dealings with their flour, as existed in the case of Hollins & McBlair. At all events it was not for three years after the death of Patrullo, that both claimants, or either of them, made claim for the flour, and the claim in both cases was rested on the taking of the flour by Venezuela forcibly under the mask of a voluntary contract of purchase. It was stated that in addition to the calamity of war which then wasted the country, an earthquake which took place on the 26th of March, 1813, had caused great destruction of life and property through a large portion of the province of Caracas.

The arrival of the flour by the *Speedwell* and the *Eleanor*, it was claimed, was just in time to meet the more pressing necessities of the people, and save many of them from actual starvation. Accordingly it was contended that the flour was

really seized for public use by Commissioner Eduardo, although he went through all the forms of a contract for its purchase. On this representation Mr. Forsyth instructed Mr. Williamson to make demand for indemnity, provided he was satisfied on investigation that the representation was correct. It would seem that this idea of force was abandoned by Mr. Williamson, for no peremptory demand was ever made upon Venezuela for settlement, as was at first contemplated, on the assumption that the flour was forcibly taken to feed the starving sufferers by the earthquake. We have no doubt that such an assumption was without foundation, and we think this can be shown by a single circumstance. The flour arrived at La Guayra not later than the 26th of April. The earthquake took place just a month before, but it would seem that the cargoes of the *Speedwell* and *Eleanor* were allowed to remain on board until the 23d of the following May, and then so far from being distributed among the people for immediate consumption, the flour was sent off, some in a week and some in two weeks afterwards, in large lots, half to Puerto Cabello and the other half to the provision store at Caracas. This is entirely irreconcilable with the idea of a pressing exigency and a forcible appropriation of the flour to meet it. It may be, and very likely was, that the flour was needed for the army, and was bought for this purpose, but there is nothing in the facts as they appear in the record to prove that it was forcibly seized for any purpose. This, however, is a matter of no moment except as affecting the character of the claim and the relation of the United States to it, for in the case of the forcible taking it would have been a tort, and would have justified reclamation in a different spirit from that which gave it character as a mere breach of contract. With this inquiry we are not concerned. It has not escaped the observation of the Commission, however, that Mr. Griffith Stith, who was supercargo on board the *Eleanor*, and who was a witness of the transaction between Patrullo and Eduardo, in an affida-

vit made by him on the 12th of January, 1838, in giving an account of this flour contract, makes no mention or allusion to the exertion of force, either open or menaced. Besides the masters of the schooners on their return to Baltimore could not have refrained from mentioning so important a matter, and both Donnell & Sons and Hollins & McBlair, had this been the case, would have been quick to solicit the interference of their government, at least as early as 1824. After the case was turned over to Mr. Williamson that gentleman carried on a protracted correspondence with the authorities of Venezuela and his own government until 1838, the result of which may be summed up as follows: That Venezuela finally insisted that Patrullo had received full payment for the balance due on the flour by an allowance made to him of a custom-house credit by the Spanish authorities, and that this credit, in a long course of dealings between 1812 and 1820, had been finally extinguished by debits on account of duties on goods which he passed through the custom-house under the control of the royalists, although strangely enough this singular mode of liquidation was suspended between August, 1813, and August, 1814, during which period Patriot Venezuela, the real debtor, had managed temporarily to reassert her ascendancy.

Patrullo certainly had no legal claim which he could enforce for the allowance of this credit. Spain was certainly not bound to pay for flour which had been purchased by her enemy, and there can be no reasonable presumption made that such was her intention. On the contrary, every reasonable presumption and intendment are against it, and the evidence shows that so far from undertaking to make this payment for and on account of Venezuela, Patrullo was authorized to extinguish the debt by the deposit of the paper money.

If the flour itself remained in specie, Spain had the right to take it as enemy's property. If, on the other hand, she chose as an act of grace or bounty to allow an advantage with respect to it, in the shape of custom-house credits to

the consignee, we cannot perceive, even conceding all the law claimed by the counsel of Venezuela, how such a liquidation by a complete stranger could discharge her from the obligation of her contract which was to give coffee, and not even money, let alone credits, in exchange for the flour.

Concede that the Spanish law regulating the rights and duties of foreign consignees in force in the territory of Venezuela by virtue of Spanish ascendancy, converted the agent into a principal, in his dealings with third parties, and that the political entity known as Venezuela can take advantage of the dealings between a stranger and the consignee for the purpose of discharging its obligations, still the inquiry must be, whether the obligation has actually been discharged in manner and form as it was contracted. The common law, it is well known, would not permit one man to make another his debtor without his consent. According to this law, A could not pay the debt of B to C, so as to give him a right to claim indemnity of B, but the extracts from the Spanish code quoted in argument are certainly the other way.

This notion was borrowed, perhaps, from the *gestio negotiorum* of the Roman law a sort of spontaneous agency, exercised without authority and arising from motives of benevolence and friendship. (2 Kent., p. 801, 8th Ed.)

To lay a claim, however, for recompence on the part of the *negotiorum gestor*, the labor or expense must have been bestowed with the direct intention of benefiting the third party against whom the claim was made. (1 Ld. Stairs Institutions, Note g, p. 54.)

But concede that a complete stranger can make a party his debtor, *nolens volens*, simply by paying the debt, the question presses. How did Royalist Venezuela discharge the debt of Patriot Venezuela? The obligation was not to pay money, but to exchange the staple product of one country for another. It may be very well doubted whether Patrullo had the right to enter into this contract of barter. He certainly would have had no such right in England, or the United

States. (Guerreiro *v.* Peile, 3 B. Ald., 616; Hernandez *v.* Rodriguez 5 John. Ch., 429.)

It was his business to sell for money, and not for produce, but waiving this, and treating the contract as a valid transfer of the title to the flour, the answer is yet to be given to the question, How the stranger enemy, Venezuela, could discharge the patriot Venezuela by any method short of an actual delivery of the coffee still due? If the law of the place of the contract was imported into it, whereby Patrullo could deal with its subject matter as principal, and if Spain, not in pursuance of this law, but of her own (the Venezuela with which the contract was made having, in the meantime, ceased to exist, or perhaps, to speak more accurately, being left in a state of syncope or suspended animation), undertook to pay the debt, so as to enable the reanimated Venezuela to claim the benefit of the payment, then it seems reasonably clear to a majority of the Commission that the payment in kind, according to the terms of the contract, was the only possible mode by which satisfaction could be made, even in accordance with what seems to them a very peculiar condition of law. The argument of the learned Counsel of Venezuela is based upon two propositions.

1. That the law of *Spain*, which, he says, was in force in Venezuela at the time of Patrullo's dealings with Spain, permitted a person to pay the debt of another, even against his will.

2. That the law which converts a foreign factor into a principal quoad third parties was the law of Venezuela when the contract was made. It is obvious as to the first proposition that there was no law of Spain in force in the Venezuela with which we are now dealing at the time referred to. The territory of Venezuela remained the same, but the law prevailing there was Spanish law, and the authorities treating with Patrullo were Spaniards loyal to the Government of his Catholic Majesty, and not the patriots, who had a mere fighting possibility in the field. The Venezuela that made this contract was, in fact, completely subverted and

displaced by another Venezuela, and with the exception of a short interval did not reappear for a period of six years thereafter. It is a confusion of terms, therefore, to say that there was any law of Venezuela, such as is claimed, in force there, unless the mere physical *corpus* of the country is meant, without respect to the body politic, in which law alone can be said to inhere and from which it receives its sanction.

In order, therefore, to give any effect to this proposition, the law of Spain must be allowed a retrospective operation, so as to enter into and form a part of a contract made with Venezuela. For it will be observed the contention is not that this law of Spain was the law of Venezuela at the date of the contract, but merely that it was in force in Venezuela at the time the Spaniards had control, which amounts to nothing more than it was the law of Spain herself. This being so it follows that it formed no part of the *lex loci contractus.* Admitting then the soundness of the second proposition, that under the law of Venezuela a factor could deal with a foreign consignment as his own, and that this entered into the contract as an implied term, there is no basis for the first, that Spain, as a stranger, could pay the debt of Venezuela, as an implied term of the contract also. But the second proposition has no legal value without the first, because the whole argument is based upon the discharge of the contract by Spain. It is to be observed, however, that no evidence has been offered to the Commission as to what the law was, except the opinions of the counsel before referred to, and while we would be willing to concede that these opinions are entitled to great respect, yet, nevertheless, we could not accept them as conclusive and as a substitute for the method by which the existence and meaning of foreign laws are usually established.

At one time this was supposed to be the law in common-law countries, and was so laid down by Judge Story in his work on Agency, sec. 268, notes 290, 433.

It was also supposed that it had foundation in the decisions of the English courts, but the doctrine was not accepted at the time without dissent from the highest authority (2 Kent, pp. 630, 631), and it has since been expressly overruled in England (Green *v.* Kopke, 36 Eng. Law and Eq., 396, 399), in which case the court held that there was no distinction in law between the liability of an agent whether the agency respected a domestic or a foreign principal. The Chief-Justice said: "It is in all cases a question of intention from the contract, explained by the surrounding circumstances, such as the custom and the usage of the trade where such exists." The ruling of the Supreme Court of the United States accords with this doctrine and deduces the relations of the parties, not from a fixed presumption of law, but from their intention, as an inference to be drawn from the facts in each particular case, and this, to a majority of the Commission, seems to be the most sensible and enlightened rule (see Oelricks *v.* Ford, 23 H., 49-65).

There can be no doubt on the face of these proceedings that Eduardo knew that Patrullo was not acting for himself, but another. Whatever the presumption of law may have been as to his powers, as matter of fact the whole record shows that he was transacting the business, not as principal but agent. He contracts as consignee of the American schooners *Eleanor* and *Speedwell*, and "in the name of the respective American masters he assents to the sale."

When he applies for duly authenticated copies of the contract, in order that they may be delivered to "each one of the interested parties," he styles himself again consignee of the American schooners, but this time gives the names of White as master of the *Speedwell* and Stith as supercargo of the *Eleanor*.

And when he follows this up with his formal protest he again declares that he "sold the flour by order and upon the consent of the supercargoes or pursers of the American

schooners *Eleanor* and *Speedwell* (adding this time) of Baltimore." He then makes his protest in "the name of the interested parties," and on the whole record could have left no doubt as to the true character of his dealings. If, in spite of all this overwhelming proof of agency, his character as principal is to be established by a fiction of law, then we think we have a right to demand that that law shall be ascertained by the clearest evidence and in the way pointed out by law for proving its existence.

The whole case rests upon an alleged fraud of Patrullo, and a fraud, too, which a stranger to the original contract enabled him to perpetrate, and it would require very clear law indeed to induce us to discharge the original debtor by such an extraordinary, and as far as we know, unexampled proceeding. To countenance the doctrine that a foreign consignee is so far a principal in dealing with the subject of the consignment that he can relieve a vendee from the undischarged obligations of his purchase and wipe out the debt, not by payment, but by obtaining a benefit for himself from a third party, stranger to the contract, in which the real party interested does not participate and never ratifies, is not only to state an anomalous proposition, not reducible to any legal formula that we are acquainted with, but also to invite the perpetration of fraud upon the rights of innocent consignors limited only by the greed or cunning of the consignee. This is all said upon the assumption that Venezuela can make good her contention that there was an actual liquidation of the credit by Spain, but this is, to a certain extent, a matter of speculation and conjecture.

The counsel for Venezuela treats this arrangement as a sale by Patrullo. He says, p. 4, brief, that "her consignors had no power, at any time, after the *second* sale had been made, at all events, to intervene and question the validity of what he had done about their flour." A good deal of this confusion of thought as to the character of this second transaction of Patrullo grows out of the misapprehension and the

consequent misstatement, unintentional of course, made by Mr. Williamson with reference to the method by which he at first supposed Venezuela claimed a discharge. It is perfectly clear to us that he mistook the property account made up by Alustiza, as of the date of the 7th of July, 1812, in which a charge is made against certain treasurers for this flour, as intended for a memorandum of sale of the flour by Patrullo to the Spaniards. This document is a patriot document, and it simply means to record the fact that the flour shall be charged at $30,000 for the whole lot, for the reason, as stated, that it was purchased in coffee, and that until the price of the coffee was ascertained or the rate per pound at which it was to be taken in payment of the flour, the treasurer could not make a definite and final entry of the cost of the flour. Mr. Williamson supposed that the royalists had come into possession of La Guayra just after the sale to Eduardo, and while the schooners were still in that harbor, and that they had then concluded a purchase begun by the patriots. It is also clear that Mr. Williamson is wrong as to dates, persons, and events, unless the case has undergone a change since his day, and we are not considering the same facts and circumstances on which he made up his opinion. He speaks of Alustiza on the 7th of July as the treasurer of the Spanish authorities, at which time it is certain that he was the treasurer of the patriot authorities. He mentions the entry of the flour as having been made by Alustiza a few days after the taking possession of La Guayra by the Spaniards, when it is an admitted historical fact that the Spaniards did not regain possession of the port until the last of July or the 1st of August, and as the entry spoken of was made on the 7th of July, it was in point of fact made three weeks *before* the Spaniards got possession instead of afterwards.

He speaks of the schooners as lying in the harbor after the Spaniards took possession, when we know to an absolute certainty that they were not there at that time. He speaks of a credit for 1,000 barrels of flour at $30 a barrel, being

allowed by Alustiza to Patrullo, and as if the allowance was made by Alustiza in his character as treasurer of the Spanish authorities on the 7th of July, 1812, when we know, indeed, the whole defence as now made by Venezuela turns upon the point that the Patrullo credit was not allowed until the 21st of April, 1813, and was allowed then for the alleged balance due on the flour.

Mr. Williamson, in a despatch under date of July 13, 1838, says that he encloses a document "to prove that the Spanish authorities did, while in possession of La Guayra, from a few days after the contract on the 23d of May, 1812, to the 20th of January, 1820, liquidate and pay Gerardo Patrullo for the 1,000 barrels of flour under the said contract with Venezuela." There is no pretence now that the Spanish authorities did more than allow credit to Patrullo for the balance due on the flour, nor that this mode of crediting him began from a few days after the contract, and after the Spaniards, took possession of La Guayra, which, indeed, would have been impossible, as the Spaniards did not get possession until sixty-eight days afterwards. It would seem from the papers that Mr. Williamson at first fell into an error in supposing that the entry made by Alustiza recorded a sale or what he calls a resale by Patrullo, of the 1,000 barrels of flour, and then naturally mistook the purport of the document, to which he refers, which was placed in his hands, not for the purpose of showing how a credit for $30,000 had been exhausted by Patrullo "from a few days after the 23d of May, 1812, to the 20th of January, 1820," but how a balance due on this flour, with which he was credited, came to be allowed, and how, from the date of credit, the 21st of April, 1813, it had been gradually satisfied by a rebate on account of customs dues, in a long course of mutual accounts terminating in 1820.

In his last despatch to his government, No. 47, under date of 24th of July, 1838, concerning this transaction, Mr. Williamson, after speaking of the credit allowed by Alustiza,

treasurer of the *Spanish authorities*, for the 1,000 barrels of flour at $30 per barrel, and referring to certain documents enclosed, goes on to say:

"These documents establish beyond doubt, I think, that Patrullo has received the balance on the contract for the flour from the Spanish authorities, without exhibiting the contract, Spain taking upon herself the payment of *said* sum upon Patrullo's declaration, the flour actually being on hand, considering it as an engagement of a part of her people and not of an independent power or nation. And thus subsequently Patrullo, to relieve himself from the claims of Messrs. Hollins and McBlair and John Donnell & Sons, presents them the *precise amount* as balance due at date as a certificate of deposit, under Spanish authority, of the paper money of Venezuela, which was hen worth comparatively nothing."

Now, it would seem very clear from the documents before us, and on what is conceded by the counsel for Venezuela, that it was not until the 15th January, 1813, that Patrullo made application to the Spanish authorities to be allowed a custom-house credit for the balance due on the flour, and that on the 21st of the following April this credit was allowed in the sum of 8,964.3 reals. There is no pretence of a sale or a resale of the flour in this transaction. It was, perhaps, a petition asking, in consideration of the friendly relations of the petitioner with the existing powers, that the government would allow him this balance, particularly as the flour had fallen into the hands of the Spaniards, and this was done because, in the language of counsel for Venezuela, "the royal authorities made no difficulty in taking up upon their accounts flour which had been furnished to the patriot authorities."

It is impossible to ascertain how this balance was computed, or to say that it is the correct balance. On the assumption that the coffee was to be valued at $12 per quintal, taking into the account credits for coffee delivered in pursuance of the contract by the patriots, there is no calculation by which such a balance can be ascertained. This difficulty gives rise to a conjecture on the part of the counsel for Venezuela, that an allowance of interest at one and a half per cent. will reconcile the discrepancy, and, on the part of the counsel for the claimant, a vigorous contention that the

credit claimed by Patrullo concerns another and different lot of flour in which he was individually concerned, and has no relation to the lot in question, and this seemed to be the opinion of Mr. Villafañe. It is to be observed, however, that the contract does not fix the price of the coffee, and for this reason Alustiza, in the memorandum of the 7th of July, says that he puts a conjectural estimate on the cost of the flour, fixing it at $30 a barrel, until he can learn, what he does not then know, at what price the coffee was to be taken in exchange for the flour. The contract, as we have before observed, is not a contract of sale but of barter, in which the parties to the exchange agreed that both the coffee and the flour should be delivered duty paid; that is, that Venezuela should give in coffee two hundred pounds, free of the export duty, in exchange for every barrel of flour, after deducting the impost. Now, it would appear that Patrullo adopted the rating of $12 per quintal for the coffee and $24 per barrel for the flour, in the case of John Donnell & Sons, who had but this single transaction with Venezuela, for the deposit made by him on their account, of Venezuelan paper money, represents on this calculation, nearly to a cent, the sum due them on account of the remainder of the coffee not delivered. This remainder amounted to 528 quintals and 86 pounds, which, at $12 per quintal, gives $6,346.32. The certificate of deposit was issued for $6,346.04, showing a difference only of 28 cents. But this calculation will not apply to the claim of William Hollins and Hollins & McBlair, because there was due to them 76,164 pounds of coffee, which, at 12 cents per pound, gives $9,139.68. The certificate of deposit issued on their account was for $7,041.75.

It is to be observed with reference to these certificates that Mr. Williamson, in his home despatch, No. 37, under date October 10, 1837, regards them as expressing the full amount due on account of these claims to both Donnell & Sons and the other claimants, because, he says, that payment of the paper money will "liquidate the claim entirely,"

and in another despatch before quoted that they represent the *precise amount* due. Now, if we add the $6,136.04, the amount deposited on account of Donnell & Sons, to the $7,041.75, the amount deposited on account of Hollins & McBlair and William Hollins, we will have a total of $13,177.79 as representing the balance due by Venezuela to these parties on all accounts on the 31st day of March, 1813. Accepting this as the ground-work of a calculation by which we are to account for the allowance of the custom-house credit to Patrullo of 8,964.3 reals, the task is plainly impossible. If the application, or petition of Patrullo, asking for this allowance was before us we, perhaps, might ascertain definitely how this balance was reached; but this paper, though called for by the Commission at the request of claimants' counsel, has not been forwarded by the Government of Venezuela.

After Mr. Williamson's despatch of July 24, 1838, in which he expressed his entire confidence in the theory that Patrullo had received the balance for the flour from the Spanish authorities, nothing more appears to have been done with these claims until they were revived under the convention of 1866, and submitted to the Caracas Commission which sat under that convention in 1868. Both claims were then allowed with the concurrence of the Commissioner for Venezuela, on the basis of the value of the undelivered coffee at the rate of $12 per quintal, with some concession as to the allowance of interest which it is not necessary to notice. It is now our duty to pass upon them, and in view of the opinion we have already expressed that the alleged payment to Patrullo, whatever its character, cannot be treated as payment to the claimants, we must, as far as the Donnell claim is concerned, allow the full amount of the principal sum claimed.

As to the Hollins & McBlair claim, as before observed, we do not feel justified in making a greater allowance than the amount deposited to their credit by Patrullo in paper money; that is, say, $7,041.80.

It is apparent from what we have said in exhibiting the dealings between Patrullo and his principal, William Hollins, and Hollins & McBlair, that Patrullo availed himself of an opportunity, created by the state of the accounts concerning muskets and flour, and their general dealings with Venezuela, to conceal or confound for some purpose the exact truth with respect to the flour claim in a way that was not open to him in the case of the Donnells, which represents but a single transaction.

It seems clear to us that William Hollins did not understand the true state of the account with Patrullo, and this explains satisfactorily the apparent contradictions in his conduct and the discrepancies in the account which we have before noticed. Again, no other hypothesis that we can think of will reconcile the otherwise inexplicable apportionment of the coffee delivered between these claimants, and the acquiescence of Hollins and Hollins & McBlair in so unjust a division, or will explain the cotton credit in paper marked No. 10.

It may be that the claim for muskets as well as the claim for flour had not been satisfied, and that the deposit of the paper money was made on account of the musket and not the flour claim; but it is impossible for us to say, with the papers and accounts as they appear before us, that such was the fact or what the true facts are after such a long lapse of time, during which the contemporaries and the most of their immediate descendants connected with the transaction have passed away. This, indeed, as already intimated, might furnish a reason for rejecting the claim altogether, but notwithstanding the obscurity which hangs over it and the accounts, and having regard to the defence of Venezuela which relies upon payment made to Patrullo in the manner described, and does not pretend that payment has ever been made to the claimants themselves, except as an untenable inference of law, we should not be satisfied that justice was done without making some allowance.

But when it comes to fixing the principal of the sum to be allowed, this same obscurity and the discrepancies we have noticed prevent us from allowing a greater sum than the amount as expressed in the certificate of deposit and payment of which, in the opinion of Mr. Williamson, in 1838, would have liquidated the claim entirely. As to the allowance of interest we have not so much difficulty.

Remembering the condition of the country which has been before described, and to which the claimants refer as affording an excuse for the long delay in presenting their claim, and the fact that it was not presented until 1835, it would be manifestly unjust to make any allowance on this account for the interval between that date and the origin of the claim in 1812. After Mr. Williamson had opened negotiations for a settlement which terminated, in the defence, of payment to Patrullo by the Spaniards, and which, although accepted by him under protest, appears to have been acquiesced in, or at all events submitted to, no active efforts appear to have been made by either the claimants or the United States, to prosecute these claims for a period of thirty years, when the controversy was revived before the Caracas Commission in 1868. Is there any fair or just ground on which interest can be claimed during this interval? We think not. The case is not one which calls for the rigid application of the doctrine that interest is the indemnification which the law allows for detaining money unjustly. The flour was shipped to Venezuela, in all probability, on the temptation of large profits attendant upon a commercial venture of an extra-hazardous nature, possibly on the risk of seizure and confiscation by the Spanish authorities as contraband of war. In point of fact it is claimed to have fallen into the hands of the Spaniards, who made use of it, and from motives concerning him personally gave credit to the consignee for the balance due on account. The correspondence of Patrullo shows that Venezuela at the time would probably have paid this balance in coffee, according to the

terms of the contract, had there been sufficient transportation to carry the coffee from the interior to the seaboard, but at this time mules appear to have been the only carriers available, and all the mules were needed for the army. The schooners, with the expectation that such a delivery might be accomplished, appear to have lingered at La Guayra up to the very day almost when the Spaniards took possession, and sailed then only to escape capture.

The original theory of the forcible appropriation of the flour was abandoned, and as another evidence that there was nothing in it, we might refer, if necessary, to the letter of Patrullo of June 7, 1812, in which he makes mention of the sale, and that a handsome profit would be realized, without intimating that the contract was not a voluntary undertaking or that the flour was required to relieve the necessities of the people caused by the earthquake. So in the protest which he makes on the 28th of July following, for breach of contract, there is not a word to show that the contract was other than voluntary.

There is nothing that we can perceive in the origin and history of such a claim which calls for an allowance of interest such as would be proper and just in any ordinary case where money lawfully due has been unjustly detained by the debtor without any excuse, legal or equitable, for its non-payment. It has been contended that the conduct of the Venezuelan authorities in setting up the contradictory defences of payment to Patrullo by the Spaniards and of payment by the deposit made by him in paper money shows insincerity and double dealing, and a deliberate design to escape from performance of a plain obligation.

When it is remembered, however, that a period of twenty-five years had elapsed before the claim was originally presented, and that in the meantime the community represented by the political entity which now goes by the name of Venezuela, had first been Patriot and then Spanish, then Patriot and Spanish again, and then Patriot; and had besides

been merged in another sovereignty for a period of ten years included in this interval, the whole period being marked by a continued struggle for existence, frequent changes in administration, and all the uncertainty and confusion in the orderly administration of government and in the keeping of regular accounts, which such a dislocated and revolutionary career involves, it is no cause for injurious criticism that her officials, when called upon to explain a transaction as antiquated and obscure as this, should have taken the course complained of, but it is rather matter of surprise that they succeeded in rescuing as much as they did from the confused rubbish at hand upon which to construct any defence at all. At all events, we do not think that it would be either a wise or a just exercise of the discretion vested in us to allow interest prior to the date of the Caracas Commission.

These claims were presented to that Commission on the 14th day of May, 1868, and from that day to the 3d day of September, 1890, we will allow interest at 5 per cent., that is to say, on the claim of John Donnell & Sons on the principal sum of $6,346.32, and on the claim of Hollins & McBlair and William Hollins on the principal sum of $7,041.80, deducting, of course, whatever sums have already been paid on account of the said claims by Venezuela in satisfaction of the original awards.

The claim for demurrage has not been taken into the account, because, as we understand the protest made by Patrullo, he paid the demurrage himself. We will sign a decree in accordance with this opinion.

ANDRADE:

Both these claims arise out of the same contract. To the one as well as to the other the same criterion is applicable, and of the two the same opinion may be formed.

1. On the 23d of May, 1812, a contract was executed at La Guayra between Gerardo Patrullo, as consignee of the American schooners *Eleanor* and *Speedwell*, and the several cargoes thereof, and Pedro Eduardo, as commissioned by the Government of Venezuela, in virtue of which Eduardo bought of Patrullo one thousand barrels of flour, giving in payment two quintals of coffee for each barrel of flour, the coffee to be delivered by halves in thirty and forty days from the date of the contract.

2. On the 24th of July next, the Government not having delivered the coffee in the terms agreed to, Patrullo presents the contract before the Political Commandant of La Guayra making application for two copies thereof, authenticated by the notary public, for the security of the parties interested.

3. On the 28th of the same month of July, Patrullo represents to the Subdelegate of the State Revenues, with reference to the contract of the 23d of May, that of the one thousand barrels of flour sold by him to Pedro Eduardo, 480 belonged to the schooner *Eleanor* and 520 to the *Speedwell;* that to the master of the first only, 43,114 pounds of coffee had been delivered, 528 quintals and 86 pounds remaining still due; and that the captain of the second had received but 27,826 pounds of the said produce, and, consequently, 771 quintals and 74 pounds were still owing by the Government on that account.

4. On the 21st of April, 1813, following on some previous steps taken by Patrullo, acting as consignee of the American schooners *Eleanor* and *Speedwell*, the government officers of H. C. M. were directed, as it seems, to liquidate, and actually liquidated his credit *for the one thousand barrels of flour, which, on the 23d of May*, 1812, *he had contracted with*

the republic of Venezuela, reckoning a balance of 8,964 *pesos and* 6 *reals in his favor*, as entered on the account of "deposits," for last residue of the value of said flour.

5. That balance of 8,964 pesos 6 reals, together with another one of 2,630 pesos 7½ reals for which, up to the above reported date of the 21st of April, 1813, Patrullo appears to have been likewise a creditor for several other articles against the Spanish treasury, aggregating the sum of 11,595 pesos 2½ reals, is shown to have been totally paid in the course of the accounts that Patrullo continued to carry on with the custom-house of La Guayra until the year 1820, except a short period from 1813 to 1814.

"This statement," writes J. G. M. Williamson, United States Chargé d'Affaires at Caracas, on acknowledging receipt of said accounts and other documents relative to the case under consideration, "this statement and the accompanying documents would scarcely leave a doubt, but that Patrullo has received the balance due on the contract for the flour from the *Spanish authorities*." And probably that would be also the feeling of every impartial mind examining the accounts and documents alluded to. Objections are now urged respecting such statement, but by no argument sufficient to support them. If any reason for hesitation could still remain, Patrullo's will of 1828 to 1832, where no mention of his credit in that particular against the Government of Venezuela is to be found, has finally removed it.

What Mr. Williamson cannot perceive (nor counsel for the plaintiffs) is how the payment to Patrullo can be considered by this Government as a discharge from its own obligation for the contract made by its agent and under its authority. The 3d law, title xii of the Quinta Partida, which was in force in Venezuela when Spain undertook to pay for her, provided as follows:

"And not only a person is acquitted of what he owes by paying himself, but also by another paying in his name. And although he who owes such debt did not know that the other was paying for him, still he would be acquitted. And even if he knew it and opposed to it."

To which the law xxxii of the same Partida and title adds:

"Moreover, we say that where a person would pay a true debt which another owes, as soon as he has paid it, he who was owing it remains free and quit, even had the other paid without his mandate."

It seems therefore unquestionable, according to the legislation quoted, that the payment made by Spain for Venezuela was lawful and released the latter of her obligation, at least, granting that Patrullo was the legal person entitled to receive the payment. But this point is, it may be said, the pith of the discussion in the present case; which impels us to inquire into the nature of Patrullo's connection with the contract of the 23d May, 1812. There he appears from the very beginning, stipulating for the sale of the flour, as *consignee* of the American schooners *Eleanor* and *Speedwell*. In his character of *consignee* of these schooners, he signs his petition of the 24th of July addressed to the Political Commandant of La Guayra; in the same character he makes his protest, on the 28th of July, before the Subdelegate of the Public Revenues. Later on, January, 1813, in his application to the Spanish officers of the Treasury, our agent acts as *consignee*. As *consignee* of the flour is he named again and again by William Hollins in his letters to the Hon. John Forsyth, Secretary of State. That Gerardo Patrullo, then at La Guayra, acted as *consignee* in the disposal of the flour, is also attested by Winchester and Faulac. Griffin, supercargo of the *Eleanor*, declares that on his arrival at the said port of La Guayra, he *consigned* the cargo of that schooner to a certain Gerardo Patrullo, commission merchant, etc.; and finally, that Patrullo entered into this contract as a *consignee*, is contended for by Mr. Williamson throughout. If, when the record discloses full and competent evidence in regard to a fact, it is understood to speak the truth, the conclusion may be now fairly said to be established that Patrullo was a commission merchant who, in that capacity, received consignments of vessels for dispatch and goods for sale, in consideration of a

certain commission, for account and risk of other parties; which was, properly speaking, what the mercantile law of that time called a *commissary* or *commissionary*.

According to that law, which in substance is still now the law of Spain and Venezuela, the consignee, commissary, or commissionary, by whatever name he may be designated, was not the *representative* of the owner or shipper of the goods consigned to him, nor his *substitute* to transact business for him; but an agent intrusted with the possession and control of the goods, who might sell or transfer them otherwise in his own name, for account and risk of the consignor, as already said. While bound to follow the instructions of his consignor and to execute the commission in his interest, and to render him accounts and enable him to claim all the advantages and be bound by all the disadvantages of the consignment; though obligated to him and responsible to him, yet his action in reference thereto was legally understood to be his own, and its legal consequences devolved only upon himself, there being under the law no possible representation of the consignor in the acts of the consignee. In this respect the Spanish law and jurisprudence were rigorously conformed to the strict and well-known principle, which originally characterized the Roman civil law, to wit: That a citizen could not be represented by another (*nemo alieno nomine agere potest*), except in certain cases, by the persons subjected to his power, because they were considered to form with him, one single and sole person; that only *he* could act in his own interest and perform, *by himself*, the various solemnities of the civil acts. (See Ortolan, Explanation of Emperor Justinian's Institutions).

From several precepts of the "Ordsnanzas de Bilbao" may the proper notion of the reciprocal obligations and actions, produced between the parties to a contract of commission, be inferred:

(*a*) "Whenever he shall receive goods for sale (either from these kingdoms or from abroad) for account and risk of their owners, the commissioner shall attend, respecting the sale. to the instructions he may receive to carry it into effect, either for cash, or for credit, or in exchange, punctually executing and observing them, and acting as in own business.

(*b*) "In collecting what they have sold on credit, commissioners shall be very active, not allowing, because of their negligence, the owners of the goods to suffer any delay in the payment, or loss in the affairs committed to their care.

(*c*) "Whereas it frequently happens that a commissioner sells, at different periods, to one or more buyers, merchandise of his own, and of others on commission, for credit or for cash, making, with respect to the buyer, a common account of all; and afterwards the vendee pays a portion of money, without distinction, on his general account, and before closing it puts an end to his business, yet owing a considerable balance; from which quite a number of contentions and quarrels result between consignors and consignees; in order to avoid them in future, it is ordered and commanded: That said consignees shall keep accurate account of all the merchandises which they may sell in that wise, distinguishing those of their own from those on commission, and to whom they belong as well as from whom they receive the sums paid by the debtor, in order that the case of failure or other unforeseen accident occurring, they may proceed, according to distributive justice, in applying to themselves and to all other interested persons the respective portions of the estate.

(*d*) "The value of the goods sold being collected, the consignees shall follow the orders of the owners as to their product, that they may be reimbursed therefor."

In relation to the business transacted with third persons, the principle that the consignee contracted in his own name and bound himself to them, in the same manner as the said third persons remained bound to him only, was still more rigorously applied. The consignor might act against the consignee, to the end of obtaining from him the cession of his rights against the third party, but never against this directly.

In the case of bankruptcy, the Ordinanzas de Bilbao go on to order:

"Whoever may stand debtor to the bankrupt at the time of the failure *do not pay any sum to him or to his order*, but only to the trustees appointed by the creditors thereof, on pain of second payment."

And in another place:

"If, in consequence of the sale of merchandises on commission made by the bankrupt, it be found that any of the purchasers has not paid the value thereof, or part of it, what in that case may be still due by the said purchaser, shall be declared to pertain to the owner of the goods or merchandise, such goods not being liable to enter into the general property of the bankrupt."

Whence it is to be logically drawn that the consignee was at all events exclusively considered as the person to whom the third parties were obligated, since they could not be discharged of their obligations in regard to him, but by the consignee himself, or by the judicial authority, or by operation of law. It follows, therefore, that the law of the place where the contract under examination was stipulated (*in quo negotium gestum fuit*) declares, as shown, that the contract of commissions created no legal obligation between the consignor and the persons to whom the consignee sold the goods consigned to him; no *vinculum juris* from which any right or duty between the consignor and the purchaser of the consignment could be derived, as between creditor and debtor.

In such state of things Patrullo was the true, actual creditor of Venezuela; the only one who had the right of constraining her to fulfil the contract, or of releasing her from that obligation; the only one who had legal power to receive payment from her and to vary the terms and conditions of receiving it. In like manner, as Venezuela was the true, actual debtor of Patrullo and obligated thereby only to him, so to him only was she bound to pay.

The only point left now to ascertain is whether that law be the rule of decision by which this court is to be governed in the present case:

"The *lex loci contractus* controls the nature, construction, and validity of the contract, and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established.

"Parties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise

expressed; the maxim is that *locus contractus regit actum*, unless the intention of the parties to the contrary be clearly shown.

"The *lex loci* operates not only in respect to the nature, obligation, and construction of contracts, and the formalities and authentications requisite to the valid execution of them, but also as to their discharge. It is a general rule that whatever constitutes a good defence, by the law of the place where the contract is made or is to be performed, is equally good in every other place where the question may be litigated. * * * The same law which creates the charge is to be regarded when it operates in discharge of the contract.

"The rights of the parties are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves.

"As regards the interpretation, construction, and performance of the contract, the law indicated by the intention of the parties governs. As to interpretation and construction, this is presumed to be the *lex loci celebrationis*, unless the contract is to be entirely performed elsewhere; in which case, and also in matters relating to the performance, the intent is presumed to be in favor of the *lex loci solutionis*."

The passages aforequoted are to be met with in Kent's commentaries. Let us now hear Wheaton:

"Where the tribunal has jurisdiction, the rule of decision is the law applicable to the case, whether it be the municipal or a foreign code; but the rule of proceeding is generally determined by the *lex fori*. But it is not always easy to distinguish the law of decision from the rule of proceeding. It may, however, be stated in general, that whatever belongs to the obligation of the contract is regulated by the *lex domicilii*, or the *lex loci contractus*.

"The obligation of the contract consists of the will of the parties expressed as to its terms and conditions. * * * The interpretation of these depends of course upon the *lex loci contractus*, as do also the nature and extent of those implied conditions which are annexed to the contract by the local law or usage."

Calvo states the same principle in the following words:

"In strict right contracts must be governed, in respect to the legal value of their form and the effects deriving from their stipulations, by the law of the place in which they have been executed. This rule deducted from the axiom *lex loci contractus* is founded not only in the mutual convenience of the parties, but also upon the moral necessity, for nations, of living in friendly relations with each other."

So also Fiore (Diritto internazionale privato):

"It must, then, be admitted in general that, excepting what affects the personal capacity to give authority to the acquisitive fact, the legal obligation arising therefrom should depend on the law of the place where it has taken its rise, for ordinarily it is to be presumed that to this law both creditor and debtor have been willing to submit themselves.

"Certainly, whenever the option to prefer the law of the place of execution, or that of the debtor's or the creditor's domicile, be not expressly declared, or the preference does not clearly result from the circumstances, it must be reasonably presumed that the parties have had the intention to refer to the law in force at the place where the fact capable of producing the legal obligation was performed by them.

"As to the obligations derived from contract, the *vinculum juris* which binds the debtor and the creditor, is established by the union of their consent, *duorum pluriumæ in idem placitus consensus.* Now, the law of the place where the union of two or more persons' consent was verified in order to constitute, regulate, or solve a legal relation between them, is that which should regulate the obligation.

"In our opinion, it is indubitable, that the conditions essential to the existence of the obligations and necessary to their validity must depend on the law of the place in which the parties have obligated themselves."

And Vincent et Ténaud (Dictionaire de droit international privé):

"Which is the law that must govern contracts, that must serve to measure their validity and interpret them?

"The principle which rules this matter is set forth in article 1134 of the civil code, which provides that contracts are the law of those who enter thereinto.

"The law, writes M. Weiss, thus proclaims the autonomy of the contracting parties; it allows them to regulate by their own will, within the limits of the capacity which it recognizes to them, of public order and good customs, their legal relations, to dispose of their patrimony, to create obligations. Nothing prevents them from referring, through a formal stipulation, to the provisions of a foreign law, which they appropriate to themselves and embody in their contract.

"There is no difficulty, therefore, where the contractors refer expressly to a determined law; but frequently the parties keep silence; it is then necessary to resort to construe how, in order to determine what their presumed intention was.

"But the majority of jurisconsults and the weight of authority pronounce for the *lex loci contractus.* It is, in fact, presumable, that the contracting parties had in mind the law of the place where the contract was executed.

"It has been decided that the contractor with a State is presumed to have submitted himself to the law of that State and to its jurisdiction."

If, according to the foregoing authors, the rule of decision as to the obligations derived from contracts in general, is the law of the place in which the contract was executed, unless excluded by express reference of the parties to another law, that must be all the more true with regard to contracts of commission made with parties residing abroad, in which the plain submission of the consignor to the municipal law of the place where the consignee resides, appears more clearly implied. Fiore says in fact:

"Applying now the principles before stated, it is clear that, because of the mandate or commission contract having become perfect in the country where the mandatory resides, it must be governed by the law there prevailing."

But the local law, applicable, in conformity with those recognized and accepted principles of international law, to the cases of John Donnell and Hollins & McBlair, owners of the flour sold by Patrullo to Venezuela, requires, as shown, that the claimants should prove the obligation of Venezuela to them, and consequently their right of action against her, under the contract of the 23d of May, 1812; this contract not creating any legal relation between the consignors of the merchandise and the third person with whom the consignee contracted, while with respect to Patrullo and Venezuela, it created a legal relation as between creditor and debtor.

By that law, it may not be improper here to recall, Patrullo acted for account and in the interest of his consignors, but in his own name and as the owner of the flour; in order to enable him to act in the name of the consignors and legally bind Venezuela to them, express power was necessary, and of the existence of this there is no evidence. The words "in the name of the respective American masters" used in the 3d clause of the contract are not presumed to import such power, or to mean the substitution of the claimants in the legal position of Patrullo regarding Venezuela. The commission for selling the flour had been given to Patrullo, not by the owners thereof, but by their agents, the masters of the *Eleanor* and *Speedwell*. The sale had been made on

time, and when the commissioner is not expressly authorized to sell on credit, he is understood to have done it on cash, and thus gives the commissioner the right to demand immediate payment for the thing sold. Very probable, then, these words were intended to signify the ratification thereof by the commissioners and the release of Patrullo from claim of any kind on that account; which seems to be corroborated by the expressions "in accordance with the interested parties," "by order and with the consent of the supercargoes of the American schooners *Eleanor* and *Speedwell*" appearing in the petition of the 24th of July and in the protest. Venezuela only by Patrullo could be compelled to the fulfilment of the obligations which she had entered into through the flour contract, because only he became her creditor in virtue of said contract. If Patrullo consented, as it appears, to the subrogation of Spain in her obligations with respect to him and afterwards accepted payment from Spain in coffee, or cotton, paper money custom duties or otherwise, he had the legal right to do so, and what he did is presumed to have been lawful and valid. This is the logical inference drawn from the application of the law of the case, to the object of ascertaining the mutual legal position of the parties intervening in the sale of the flour, and from the admission that Venezuela was discharged from her debt through the payment by Spain to Patrullo.

Conceding now that Patrullo had not been paid, and that the claimants, by reason of their actions of mandate against him, could in this international process, obtain their claim of succeeding to his own actions against Venezuela; it is presumable that such right could not be granted to them, except if they previously proved that the original obligation of Patrullo to them had not, by some proper way, been extinguished, and as to this desirable effect their efforts seem to have also been frustrated.

According to the protest of the 28th of July, 1812, for account of the 520 barrels of flour per the *Speedwell*, Vene-

zuela owes at the said date 77,174 pounds of coffee, or 9,260.88 *pesos*, converted into pecuniary value ; which amount is three days after, through the delivery by Venezuela of 100 bales of cotton, accepted in payment by Patrullo, reduced to 7,740 *pesos*, 7 *reals* (Patrullo's account of July 31, 1812, endorsed by Hollins & McBlair.) On the 7th of June, Patrullo wrote in reference to the same 500 barrels of flour per *Speedwell*, as if apologizing beforehand for the acceptance of the cotton, or anything else, instead of the coffee as agreed to :

"The flour per the latter vessel has been sold * * * on board, deliverable in thirty days, * * * but as I told you above, the difficulty of transporting the goods is very great."

On the same day Patrullo despatches the *Rolla*, for Baltimore, consigned to the said gentlemen, as it appears, with the following cargo : 1,040 bags of coffee, whg. 120,081 pounds net, for $13,208.91 ; and 59 seroons of indigo, whg. 5,900 pounds net, for $10,243.75, total $23,452.66 ; further writing :

"The *Sparrow* is nearly loaded and will sail to-morrow. She carries no indigo, the Government not finding any, and indeed there is none to be had ; and such is the scantiness of our means of transporting, that I think I shall have a good deal of trouble in dispatching the *Speedwel*" (Letter of June 7, 1812, from Patrullo to Wm. Hollins and Hollins & McBlair.)

That letter is afterwards confirmed in connection with the cargo of the three vessels therein mentioned, by an account beginning with the words : "Don Casiano Medranda, commissioned by the Government of Caracas, owes," composed of the following items :

On the Debit side.	*On the Credit side.*	
$18,638.00	He delivered to the *Rolla*, .	$23,552.66
27,650.00	do to the *Sparrow*	11.026.40
	do to the *Speedwell*	4,667.14
	Still owing by the Government	7.041.80
$46,288.00		$46,288.00

And endorsed by Hollins & McBlair as follows :

"Account of what remains owing by the Government of Venezuela. on account of contract for muskets and flour per *Speedwell*, received from G. Patrullo, in his letter dated Philadelphia, 25 June, 1814."

If it be noted that this paper contains a general statement of the commission business carried on, up to its date, between Patrullo and Wm. Hollins and Hollins & McBlair,—of what the former had received for sale, muskets, flour, and other goods, and of what he had sent in return to his principals per the *Rolla*, *Sparrow*, and *Speedwell*,—and if it is borne in mind that Wm. Hollins, in writing to the Hon. J. Q. Adams, in December, 1824, hastened to communicate to him an existing claim which he held against the Government of Colombia, of $7,041.80, under a contract with the Government of Venezuela, for *muskets furnished* at the commencement of the revolution in that country, there will scarcely be any doubt left, but that Hollins & McBlair were totally paid by Patrullo for their share in the contract of the flour per the *Eleanor* and *Speedwell*, and that the said balance of $7,041.80 belonged in whole to the muskets contract. It is this muskets contract, undoubtedly, that Patrullo made allusion to in his letters of the 17th of June and 29th of July, 1812:

"It is painful to me to have to inform you that the Government has not fulfilled the contract. This change, I fear, will be unfavorable to your interest, and I do not see much probability that the remainder of the contract, say $7,000, will be carried into effect."

"As for the flour contract," he went on to write, "I have protested for non-payment; however, you must rely on the continuation of my utmost exertions to have it fulfilled;" and the reality of his endeavor was soon proved, as it appears, by the actuality of the fulfilment thereof. This must have been accepted as the truth, also, by the old firm of Hollins & McBlair, there being no indication on record of their having ever instituted, or attempted to institute, any action against Patrullo, during his lifetime, or of Patrullo having considered himself under any obligation to them, after the above-mentioned statement of accounts.

On the 31st of March, 1813, Patrullo made three deposits of paper money in the public treasury of La Guayra: one of 6,346 *pesos* 6 *reals*, for account of John Donnell, evidently

representing the value of the coffee due in exchange for the flour of the *Eleanor;* another of 7,041 *pesos* 6 *reals*, for account of William Hollins and Hollins & McBlair; and another one of 3,307 *pesos* 6 *reals*, also for account of these gentlemen. But of these two last, the one of 7,041 *pesos* 6 *reals* represents, as already stated, the balance of the muskets constituting the claim held by William Hollins, in 1824, against the Government of Colombia, under a contract with the Government of Venezuela; and the other, of 3,307 *pesos* 6 *reals*, had no relation to the cargo of the *Speedwell*, according to a letter written in 1835 by William Hollins to the Hon. John Forsyth. Thus, the two statements, far from being inconsistent with each other, concur to confirm the proposition that Hollins & McBlair were paid by Patrullo the whole amount of their flour per the *Speedwell*. Otherwise he would have deposited also, in paper money, either the sum of 9,260.88 *pesos*, mentioned as equivalent in cash to the 77,174 pounds of coffee due, as per the protest, for account of the said flour, or the sum of 7,740 *pesos* 7 *reals*, to which that balance was reduced in Patrullo's account of the 31st of July, 1812. For us, it is obvious that one of the two component parts of the total amount of 46,288 *pesos*, on the debit side of the statement under analyzation, exhibits the value of the muskets contract, and the other, that of the *Speedwell's* flour and the other goods consigned by Hollins & McBlair to Patrullo, while the three entries on the credit side (shipments by the *Rolla*, *Sparrow*, and *Speedwell*) represent the payments made by Patrullo on account of both parts. Hence, the endorsement of Hollins & McBlair, showing that statement as the "account of what remains owing by the Government of Venezuela on account of contract for muskets and flour per *Speedwell*," is likewise reconciled with our construction that Hollins & McBlair were delivered by Patrullo the whole amount due to them for various articles, except the balance of 7,041.80 *pesos* of the muskets contract.

It is true that there is a third statement, previously shown

to be unquestionable, in accordance with which Patrullo was credited and subsequently paid by Spain 8,964 *pesos*, for balance of the flour contract in April, 1813; which certainly would not agree with that endorsed by Hollins & McBlair. But that agreement is not necessary. The one statement has relation to the dealings of Patrullo with the Government of Spain, the other to those of Patrullo with Hollins & McBlair, and they may differ with each other and yet both be true. It is not contradictory to suppose that Patrullo had made payments to a greater extent than he had received for account of such contract, and that, while he had already satisfied all his debt to Hollins & McBlair, Spain retained still part of the equivalent to the *Speedwell's* cargo, besides the value due on the *Eleanor's* flour. In short, Patrullo considering himself bound, as no doubt he was, under his mandate contract with his consignors, to pay them for the goods sold by him on commission, independently of the payments he might receive from his debtors, he did so; that is our theory.

As for John Donnell, no evidence at all with respect to his credit is to be found after the protest, except the deposit before mentioned; but there is reasonable ground for believing that it was cancelled in like manner and with no less exactness than Hollins and McBlair's. The former and the latter were involved, having been the legal consequences of the same Commission, and both had trusted Patrullo with equal confidence; why should it be thought a thing improbable that the one and the other had been dealt with by him with equal fairness and attention? And if it was not so, why should it be deemed unjust to require the proof to the contrary? It might, perhaps, be answered that such requirement is fully met by the evidence of the deposit of paper money, exactly equivalent to the value of this credit, made on the 31st of March, 1813, which was not the case with the credit of Hollins & McBlair, and tends to show that, at least, up to the said date, the former had not yet been extinguished

by Patrullo. But there is also evidence that in August, 1813, after the reoccupation of La Guayra by the patriots, Patrullo escaped to Philadelphia, where he remained until his return to La Guayra, in the summer of 1814; and after 1820 came again to Philadelphia, where he died in 1832. In view of this circumstance would it be inconsiderate to suppose that Patrullo discharged his indebtedness to John Donnell on either of those two opportunities, and more probable in the first? This supposition might, at least, serve to explain satisfactorily the fact so worthy of attention, and inexplicable in a different manner, that the claim here contended for was never urged either against Patrullo or against Venezuela, while John Donnell and Patrullo lived; it was, as appears, but after the death of both the original creditor and debtor, and after a controversy between the successors of the former and the latter, which left it in the possession of Patrullo, that it was for the first time presented to Venezuela by the executors of John Donnell, through the United States Chargé d'Affaires at Caracas, probably ignoring its previous cancelment. At any rate, were this not the truth, yet from the want of evidence in this case, that the creditor had called in due time for payment on the debtor, or had not neglected to press his claim seasonably, it would be just to presume that the former had abandoned his right to the latter, and might not to be considered any longer as having any right in the premises, under the rule of *prescription*, which is another *modus tollendi obligationem*, by which, says Vico, the negligent are liable to be punished, with the loss of their property, for the injury they do to themselves.

Therefore, the claims of the executors of John Donnell & Sons for $ and of Hollins & McBlair for $ should, in my opinion, be both disallowed.

LITTLE:

The salient facts appear to be:

(1) The claimants bartered their flour to Venezuela for coffee—a barrel of the former for two quintals of the latter.

(2) Venezuela received all the flour, 1,020 barrels.

(3) They in return received only a part of the coffee.

(4) There was a balance due them which *they* never received from any source, and which *she* never delivered or accounted for to anybody.

The defence is, that Patrullo, their agent in the transaction, after the Spaniards obtained control, secured from them a credit on his own account on the custom-house books of La Guayra for the value of this balance due, and that that cancelled the obligation.

I think not. There is no evidence of any authority from the claimants to him to deal with that balance on his own account, or otherwise than to receive and forward the produce. I am not prepared to say that an agent thus beyond the reach of his principals might not, under some conceivable circumstances, deal with their credits outside of the scope of his general authority, without their express consent. It may be that if Venezuela, as a political entity, had become irretrievably extinguished, and that fact had been generally known and acknowledged when Patrullo got the credit, the law would have presumed an assent on the part of his principals to the transaction, made in good faith, as the only hope of any return left to them.

But such was not the situation at that time in Venezuela. The spirit of liberty was still abroad in the land. Its citizens were preparing for a renewal of the conflict, and had, in fact, an army in the field. The chances of payment to the principals were not gone, nor even, perhaps, desperate, in April, 1813, when Patrullo got the credit. Under such circumstances their authority or affirmance would be necessary to bind them.

Unquestionably the *lex loci contractus* entered into and formed a part of the contract of barter with Venezuela. But no law of that country has been cited, as I conceive, that would authorize a broker thus to deal with his principal's property.

And I do not at all question the law quoted by Mr. Commissioner Andrade, to wit:

"And not only is a person acquitted of what he owes by paying himself, but also by another paying in his name. And although he who owes such debt did not know that the other was paying for him, still he would be acquitted, and even if he knew it and opposed it."

The difficulty is in the application to the facts. Spain did not pay the balance for or *in the name* of Venezuela. There was no purpose to free her enemy from the obligation, either on her part or that of Patrullo. The latter, as the evidence shows, always regarded that obligation as continuing and even, as it would seem, attempted to discharge it in worthless Venezuelan paper money as pointed out by Mr. Commissioner Findlay.

The claims were not presented to the Government of the United States in their true character, not from any purpose to deceive on the part of the claimants, but because of lack of full information from their agent. The demands were not therefore well understood by either Government, and for that reason—visiting the penalty upon those necessarily to be charged with the fault—they should not bear interest, prior to their full elucidation which, it may be assumed, occurred before the former Commission.

Claim of

MELVILLE E. DAY and DAVID E. GARRISON, as Surviving Executors of Cornelius K. Garrison,
v.
THE UNITED STATES OF VENEZUELA. } *No.* 38.

[July 14, 1890.]

FINDLAY, for the Commission :

As originally presented to the Caracas Commission, this claim was made for $614,700, as damages resulting from the annulment of two several contracts by the government of Venezuela, one to establish a line of steamships between La Guayra and New York, and the other to turn a constant current of emigration into Venezuela. The U. S. Commissioner allowed on this claim the sum of $351,150, remarking, however, at one stage of his opinion that it is possible he may have done the claimants "*great* injustice," and at another that the claimants themselves "have not in fact demanded or asked as much as they were entitled to recover." There being a difference of opinion between the United States and the Venezuelan Commissioner, which sent the case to the Umpire, a final award was made by that judge of $250,000. This decision of the umpire appears to have been made on July 20, 1868. The journal of proceedings of the old Commission shows that the Commissioner of Venezuela moved on the 11th of July, nine (9) days previous, as follows : "The Commissioner of Venezuela lays before the Commission for its consideration a *representation* addressed to the Government of Venezuela by Messrs. *Beales and Nobles* asking for the sum of $200,000 as indemnity for losses and injuries arising from the annulling of the contracts upon immigration and a line of steamers, &c. As this claim, the minute proceeds, is *now* before the Umpire for his final decision by reason of the Commissioners not having agreed upon it, the Commissioner of Venezuela proposes that the document

referred to shall be sent this day to the Umpire, by the Secretary, in order that he may have it before him at the time of issuing his decision; agreed to." By this it appears that the U. S. Commissioner allowed on the whole claim $151,150 more than the claimants themselves asked, and that the Umpire exceeded the amount asked by $50,000. It also appears that this representation, as it is termed, was addressed by Messrs. Beales and Nobles to the government of Venezuela, and their alleged co-contractor, Cornelius K. Garrison, whose representatives present the claim to this Commission, was not a party to that representation. The preliminary steps towards the procurement of the power from the government of General Paez, under which these contracts were negotiated, and the expenses connected therewith, constitute distinct claims of Messrs. Nobles and Beales, as stated in Schedules A and B, filed with the claim before the old Commission. The claimant's testator is conceded to have had no part in these preliminary arrangements, although it is alleged that he was "at all times cognizant of all the circumstances connected with the procuration and granting of the said contract, and is *equally* interested with the other petitioners therein." He did not sign either of the contracts, or make himself liable in any way for their performance. On the other hand, Messrs. Beales and Nobles sign both the contracts, styling themselves in the case of the immigration contract members of a colonization company, and in the case of the steamship contract, members of *said company*, as proposed in said contract, and in both cases, "for themselves and their successors, bind their persons and their properties, present and future." What the personal credit of either of these gentlemen was, or what property they had, real, personal or mixed, nowhere appears, but whatever their financial responsibility, joint or several, it is clear that the above obligation to Venezuela was no more available in the form adopted as a lien or a pledge of their resources for the faithful fulfilment of the contract than if none had been assumed.

It was stated in argument that Mr. Garrison was a man of large means. He was described as the merchant prince of his day, equal to the discharge of any pecuniary obligation he might undertake. Conceding this for the sake of the argument, it is equally true that he undertook no obligation whatever in this case. He did not even go through the form of assuming an obligation like his associates Messrs. Beales and Nobles, and this may be accounted for, perhaps, on the theory that he realized, even as to matter of form, there was more at stake for him than them. Under such circumstances it is not surprising that his representatives have found it difficult to state the precise nature of their testator's claim. In the petition presented to the former Commission it is stated that he was equally interested in the steamship contract with Messrs. Beales and Nobles. There is no averment in this petition that he had any interest in the immigration contract, unless it can be inferred from the following language quoted from the petition :

"At the same time of the execution of the agreement to which your petitioners have hereinbefore referred, another agreement was executed by and between the said José Antonio Paez *and your petitioners*, of which a copy is hereto annexed, &c., touching the cession by the said government to your petitioners of certain lands within the territorial occupation of the government of Venezuela for the use of such colonists as your petitioners might be able to debark at Caracas or elsewhere within the territory of Venezuela. For every colonist so imported by your petitioners your petitioners were to receive a stipulated cession of land and a grant of so many tons of guano."

It has been before observed that this contract was not made with Mr. Garrison ; and, although that is true also of the steamship contract, yet still as to it the petition which he signed alleges that he is equally interested with the other petitioners, but, as to the immigration contract, it not only shows on its face that it was not executed with him as a party, but there is nothing in the record that we have been able to discover which discloses any interest whatever in him. The petition, it will be remembered, in a passage in part before quoted,

states specifically that Mr. Garrison was associated with the Messrs. Beales and Nobles from the *origin* of the said contract, and was at all times cognizant of all the circumstances connected with its prosecution, &c., but this refers to the steamship contract. There is not a word in the first petition connecting him in interest with the colonization enterprise, except the passage cited, and it is very clear that this does not disclose his interest. The present petition in the second paragraph alleges that the petitioners' testator had become beneficially interested for a valuable consideration in the performance of said contracts, "as will more at large appear from the petition that was presented by the said Beales, Nobles, and Garrison to the Mixed Commission," &c.

There is no attempt by the present claimants to restate the claim of their testator or to rest it upon any other ground than that adopted in the original petition. We must look to it, therefore, to ascertain the grounds of the claim, and as has been shown we cannot discern what interest he had, if any, in the immigration contract, and as to the steamship contract can only learn by the averment in the petition that he was *equally* interested in it with the other petitioners, without a particle of other evidence to establish the fact. It is true that the present petition states that he became interested in *both* contracts for a valuable consideration, but what that was is not stated, nor is there any evidence in the case to show the nature of his interest or the mode by which he acquired it unless the fact be assumed that he was the owner of vessels and the moneyed man of the concern, and in consideration of furnishing the steamships and loaning his credit to the enterprise, was to be let in to a share of the profits, on some undisclosed agreement between him and the original contractors. Beales and Nobles having united with him in a petition sworn to by all three and stating that he was equally interested with them in a certain contract, would be estopped from denying his claim as to that contract, but his representatives appear before us and claim that they

are entitled to the one-third of the whole award made by the former Commission, "or such part thereof as your petitioners may hereafter appear to be entitled to receive," in other words claim one-third of such sum as may have been awarded on account of the immigration contract as to which the interest of their testator does not appear at all, as well as to the steamship contract, as to which, while appearing, is not established. It appears from this petition, too, that Mr. Garrison, although according to their showing he was equally interested in at least the steamship contract, received but one certificate for $10,000, out of the whole award of $250,000 made by the Umpire of the old Commission upon both contracts. It appears that this award was split into twenty-five certificates of $10,000 each, numbered from 160 to 184 inclusive, and that certificate No. 171 was passed over to him. Beales died in 1878; Nobles the year before, and both of them have disposed of all their certificates and all their right and interest in the said award. Garrison died in 1885, and paragraph five of the *present* petition recites:

"That your petitioners' testator, as appears from the *aforesaid* petition (the petition to the Caracas Commission), *had an equal undivided one-third interest in the said claim*, and in the said award and in the said certificates of award, but your petitioners have found among their testator's papers and effects only one certificate of award, to wit, No. 171, for $10,000, and there is no record, memorandum, or other evidence, so far as your petitioners have discovered from a diligent search, or are aware of, any sale or transfer of any certificates of award by their said testator, nor have your petitioners seen any evidence that their said testator *ever* held any certificates of award, other than the aforesaid certificate No. 171."

This paragraph can have but one meaning, and that is, that the petitioners' testator, instead of being entitled to an equal one-third interest in the claim, either accepted voluntarily or was forced to receive one twenty-fifth part in full satisfaction, unless what we believe is the fact, that he received the certificate as assignee in some way and not in his character as original claimant. Besides, we have shown that

the petition to the Commission at Caracas, which is referred to by the present petition as defining the scope of the present claim, so far from showing that Mr. Garrison was equally interested in one-third of it, is not only silent as to any interest in the immigration scheme, but with the exception of a mere vague averment does not disclose the extent, and fails entirely in explaining the character of his interest in the steamship contract. In view of this allegation, perhaps the prayer for relief in the alternative was drawn, that is, that they should be awarded one-third, *or such part thereof, as your petitioners may hereafter appear to be entitled to receive.* Now on such a presentation, irrespective of every other question of law and fact involved in the case, what sort of an award could be made to these petitioners? Clearly not the one-third. They do not ask it absolutely themselves, and it has been made very manifest that they are not entitled to it. But what could we allow, on account of "such part as your petitioners may *hereafter* appear to be entitled to receive." The case has been argued and submitted. Unless the part they were entitled to receive has been made apparent it cannot be made so after the submission and finding by this Commission. The word "hereafter" can only mean after the filing of the petition, and before submission and decision. This being so either upon the pleadings or the evidence, what sum could we allow as the part of the claim to which the petitioners' testator was entitled? If the petitioners cannot state with certainty and positiveness their own claim how can we make a just allowance? The holders of the other twenty-four certificates made no claim when this opinion was prepared.

But this brief sketch presents but a few of the anomalies connected with this extraordinary case. It seems that after several revolutions in Venezuela continued at intervals of greater or less duration from 1848, leaving the country in an unsettled and almost chaotic condition, General Paez assumed the dictatorship on the 29th of August, 1861, and from that time to the ratification of the

so-called treaty of Coche, on the 22d of May, 1863, held possession of the capital at Caracas.

During the period of his government, however, outside of the province of Caracas, the country was by no means pacified, but in one part or another of its extensive territory was embroiled in civil tumult and insurrection aimed against the ruling power, by the faction which it had succeeded in displacing. This state of affairs was terminated by the treaty referred to and in consequence of it General Falcon succeeded Paez who abdicated his dictatorship, and became the President of the Republic, on the — day of July, 1863, and was confirmed in his place by a constitutional convention which assembled on the 21st of December, 1863. The United States refused to recognize the Paez government, and disavowed the act of its minister, Mr. Culver, in attempting to do so. This being the condition of the government and the country, a Colonel Nobles, in the winter and early spring of 1863, while on a visit to Caracas for the purpose, succeeded in obtaining through the aid of his associate, Dr. Beales, a power of attorney from General Paez to Simon Camacho, then Consul of Venezuela in New York, authorizing him to enter into contracts with the said Nobles and Beales for the establishment of a steamship service between New York and La Guayra, and also for the "establishment of a constant current of immigration to the Republic of Venezuela." To carry these enterprises into due effect "the said Consul will act without any limitation, so the power recites, only following as far as possible the instruction to be communicated to him by my Secretary General." For fear that this broad grant of power might be restrained or limited by some unforeseen construction, the General proceeds to add, "and to remove at once any objections which might be urged against the validity of the terms in which this authority is granted, I, José Antonio Paez, Supreme Chief of the Republic of Venezuela, hereby approve *now and for all times whatever may be contracted* for by Simon

Camacho, Consul of Venezuela in New York, with respect to the said contracts for the establishment of a line of steamships between New York and La Guayra, and the immigration and colonization scheme."

Under this power Camacho, on the 1st of May, 1863, contracted for the establishment of the steamship line, by the terms of which the first steamer was to sail within one hundred days from the date of the contract, which time was afterwards, on the 4th of June, extended to eight months in addition—that is, say, eleven months in all. And which extension, by the way, was contrary to the direction of the Secretary, and opposed to one of the principal objects of the scheme. Other steamers were to follow as they could be made ready, and they were to be suitable for carrying the mails, twenty-five passengers and six hundred tons merchandise. Preference was to be given to the effects, articles, and properties of the Government of Venezuela over all other cargoes and passengers, to be paid for, however, at the usual rates charged to merchants or private individuals. Officers and troops of the government were to be carried at reduced rates. Two young men, to be selected by the government, were also to be carried free of expense, in order that they might receive practical instruction in navigation and the management of steam machinery. Other provisions were made for the carriage free of seeds, plants, &c., not exported for profit. For these services and some others Camacho agreed that Venezuela should pay $50,000 in gold coin of the United States yearly, payable in monthly instalments of $4,166.66, to be deducted from the 40 per cent. duty belonging to the government on the *imports* and *exports carried* by the steamers, but this limitation was removed by the 12th article of the contract, which expressly stipulated that any deficiency on this account occurring during any month should be made good by the receipts of the next month, although the company was to bear the loss on any deficiency at the end of the year. The 13th article then provides that this payment of

$50,000 shall continue for three years only from the date of the contract, after which time the sum of $30,000 shall be paid for the period of twenty-seven years, as provided in the 14th article.

The 18th article then stipulates for submission to arbitration at Caracas: "Any doubts, *differences, difficulties*, or misunderstandings that may arise from, or have any connection with, or in any *manner relate* to this contract, *directly* or *indirectly*," and then after providing that "the opinion of the two arbitrators or the decision of the Umpire should there be one, shall be considered as a judgment," etc., goes on to say, "and, *therefore*, this contract shall *never, under any pretext or reason whatever, be cause for any international claims or demands.*" This provision is found in both contracts. It has already been observed that Messrs. Beales and Nobles who alone sign this contract put themselves under no pecuniary obligation whatever for the due performance of its stipulations, except an ineffectual and meaningless pledge of person and property; but it is now to be observed that these parties do not contract in behalf of themselves at all, but "*in behalf of the Stock Company to be formed* upon the following terms and conditions," &c.

Accordingly this imaginary company without a name, which appears only by reference to it as a body yet to be formed, is put forward by Beales and Nobles as the party agreeing to the terms of a contract which they in its behalf bind themselves and their successors to perform. Beales and Nobles, except as becoming security in the way mentioned for the company, don't agree to anything. Each article in the contract begins with a recital that "*the company* agrees and binds itself." It is too clear for argument that the contract was made by Beales and Nobles in behalf of a company which was yet to be created, and that treating themselves as members of the said company, as if it had already been established, sign, as "*members* of *said* company, for themselves and their successors," accompanying the signa-

ture with the pledge of their persons and properties before referred to. Treating it as their contract, however, in the absence of any bond for performance, Venezuela could only look in case of failure to Beales and Nobles. The company which had no existence certainly could not be responsible. This being the character of a contract which was to run for thirty years, made under a discretionary power of this kind, the question arises whether General Paez, as the lawful *de facto* authority of the State, had the right in its name to grant such a power. If he had, of course the contracts executed in pursuance of the power would be valid and binding upon any succeeding government, and any attempt to annul them, without compensation to the parties injured by the revocation, would be unjustifiable and illegal. In stating the proposition in this way it will be observed that we are assuming that the contracts are a lawful emanation of the power, although on careful analysis it will be perceived that, in the very conception of his authority, Mr. Camacho exceeded his power. His power was "to contract with *either* Doctor J. C. Beales or Colonel W. H. Nobles, or with both, or with any other person or company of acknowledged responsibility." He did neither or any of these things as far as the steamship contract is concerned. He entered into a contract, as we have before shown, with Beales and Nobles, not in behalf of themselves, but in behalf of a company yet to be organized. This was not a contract with either Beales or Nobles severally, or with both jointly, nor yet was it a contract with any other person or company of acknowledged responsibility. It was a contract in behalf of a company *in futuro*, the responsibility of which, of course, could not be ascertained, and whose very existence was speculative and conjectural. But waiving this, and recurring to the question as to whether the Paez government had the right to grant the power to Camacho, it may be well enough to make one or two general observations on the subject of *de facto* governments. There is a well-recognized distinction between a state and a government or the governing body.

The state is a person in law, and when once admitted into the family of states preserves its identity as an international person, until it is lost by absorption in some other state, or by the continuance of anarchy so prolonged as to render reconstitution impossible, or in a very high degree, improbable.

Halleck's International Law, p. 29.

As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another cannot alter the relations of the society to the other members of the family of states as long as the state itself retains its personality. The state remains, although the governments may change, and international relations, if they are to have any permanency or stability, can only be established between states, and would rest upon a shifting foundation of sand, if accidental forms of government were substituted as their basis.

Idem enim est populus Romanus sub regibus, consulibus, imperatoribus, says Grotius, as an argument for the continued responsibility of the State, although the particular character of responsibility he is speaking of, is an obligation to respect treaties.

Grotius, I, II, chap. ix, v. 8.

All leagues and treaties are national and will bind legal princes though made with usurpers.

Tindall on Law of Nations.

1 Phillimore, p. 174.

It is a clear position of the law of nations, says Kent, that treaties are not affected nor positive obligations of any kind with other powers or with creditors weakened by internal changes in the form of government. The body politic is the

same although it may have a different organ of communication.

Kent, vol. 1, pp. 25-26.

A state is responsible for the wrongs done to the government or subjects of another state notwithstanding any intermediate change in the form of government or in the persons of its rulers. Treaties of amity, commerce, and real alliance remain in force; *public* debts, either to or from the state, are neither cancelled nor affected.

Halleck, p. 77.

A state subject to periodic changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of states, as the only possible condition of intercourse between nations. If it was not the duty of a state to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequences would be disastrous on the peace and well-being of the world. It may also be stated with great confidence that a government *de facto*, when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is styled a government *de jure*. Indeed, as Austin has pointed out, every government, properly so called, is a government *de facto*. A government *de jure* but not *de facto*, says he, is that which *was* a government, and which, according to the view of the speaker *ought* still to be a government, but, in point of fact, is not.

Austin, Juris., vol. 1, 336.

As to what constitutes a government *de facto* is a question that must necessarily depend somewhat upon the facts and circumstances in the particular case to which it is proposed to apply the principle. Austin speaks of it as a government which presumably commands the habitual respect and obedience of the bulk of the people. Halleck, when speaking of the power of a *de facto* government to dispose of the public domain or other property, describes it as a government submitted to by the *great* body of the people and *recognized* by other states. Both these conditions are essential to the lawful cession of the public domain of a state under the control of a *de facto* government.

Halleck, p. 127.

Sir Matthew Hale only consented to act as judge under a government established and *recognized* by other governments and in full possession, *de facto*, of the records and power of the kingdom after Cromwell had declared he would rule by red gowns rather than by red coats.

Hale's Hist. Com. Law, p. 14.

It has been held in England, that the courts of that country will not take notice of a foreign government not recognized by the government of Great Britain.

City of Berne *v.* The Bank of England, 9 Ves., 347.

The Supreme Court of the United States in noting the features by which a government *de facto* is to be discriminated, mentions as one of these recognition by a foreign power.

Torrington *v.* Smith, 8 Wal., p. 9.

So by the same court it was held that, a foreign government, in possession of a portion of the territory of the United States, over which it exercised undisputed dominion for the time being, was a government *de facto* as far as the place

occupied was concerned, and entitled to demand and receive from the inhabitants local allegiance.

U. S. *v.* Price, 4 Wheat., p. 253.

A government *de facto*, said Justice Nelson, delivering the opinion of the Court, is a government in the possession of the supreme power of the district of country over which its jurisdiction extends.

Mauran *v.* Ins. Co., 6 W., p. 137.

And this power has been elsewhere styled "the ruling," the "supreme power" of the country.

Nesbitt *v.* Lushington, 4 Term., 763.

While it has been uniformly held by all the writers upon this subject that the substitution of one form of government for another, or a mere change in the person of the ruling power, will not affect the validity of State action, the application of this rule seems to have been confined in the main to the maintenance of treaty obligations, and responsibility for wrongs and injuries, or torts, and where it has been extended to claims contractual in their character, appears to have been limited to public debts owing by one state to the citizens of another. It has been the uniform practice of the United States almost without exception to refuse intervention in behalf of its citizens claiming for breach of contract against the government of a foreign power, and wherever it has interfered, to restrict the character of its interference to good offices, which were defined by Secretary Fish as mere personal unofficial recommendations.

2 Whar., 233, p. 664.

While this has been the practice of Great Britain in similar cases, the government of Her Majesty has been careful to maintain that the refusal to intervene has been largely governed by considerations of a domestic character, and not upon any notion that a breach of contract between a sub-

ject of that country and a foreign power, was not a wrong which might be redressed by diplomatic intervention whenever the government in its discretion saw fit to interfere. (Lord Palmerston's circular to British representatives in 1848. Hall's Note, p. 257.)

It would be difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation upon the government of his allegiance to seek redress from the offending country, quite as binding as its recognized duty to interfere in cases involving wrongs to person and property.

Hall, p. 257.

The reasons assigned by our Secretaries of State for refusing any relief, except the mere tender of personal good offices, in cases of breach of contract, seem with some exceptions to be placed upon the broad ground that the Government has no *right* to compel another power to perform its contracts made with citizens of the United States.

See Mr. Adams' instructions April 29, 1823, cited 2 Whar., p. 644.

Mr. Fish, as late as 1870, declares that the reason of this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property.

Whar., 2, p. 656.

But however this question may stand on principle it cannot be doubted that if the present claim was valid in other respects, it would be the duty of this Commission, under the convention between the United States and Venezuela, to make an allowance of damages sufficient to compensate for the wrong, notwithstanding the fact that it originated in a

breach of private contract between a citizen of one state and the government of another.

Conceding now that a *de facto* government can bind the state in a matter of private contract between it and the citizens of another state, and that good faith as between nations binds the state as a personality to fulfil the terms of its private contracts, or pay damages for their non-fulfilment, notwithstanding any subsequent change in the ruling powers, the question first to be determined here is whether the government of Paez was such a government. Before answering the question, however, it is proper that we should state some of the provisions of the second contract relating to the colonization scheme and executed by Camacho under the same power given by Paez. By this contract Camacho cedes to the contracting parties, their associates and assigns, those public lands which until now have not been ceded, in the parts of the republic which they may select and in the quantities hereinafter explained. The second article provides that "the cession shall be made of 1,000 English acres for each person in them during the first year of the cession, the contractors being obliged to have for each 1,000 acres two persons in the second year, three in the third, four in the fourth, and so successively one person for each year up to the number of ten in the space of ten years, so that for each 1,000 acres there shall be ten persons within ten years from this date" (date of contract 5th of May, 1863.) To enable the contractors to carry out this provision they are given "the right every year to select in the part of the Republic where they may see fit 100,000 square acres of land, either in one parcel or in divided portions * * * provided that within two years from the date of such selection of lands the contractors shall have placed two colonists for each 1,000 square acres."

By the 10th article it is stipulated that the mines which may be found in the lands ceded to this colonization enterprise shall belong in fee to the contractors, and in the gen-

eric term mines are to be included, not only those of metal but also those of petroleum, asphaltum, marble, coal, and others.

Lawful possession of the lands occupied is provided for, and provision is also made for the selected lands. "The titles shall be given in favor of the contractors the day the colonists arrive at a Venezuelan port:" while the colonists, who are to acquire in no case more than fifty acres each, must wait a year before they receive a conveyance of title.

If at the end of ten years the contractors shall not have introduced the required number of colonists to entitle them to the number of acres of land as to which they have already received the initial right of selection, the privilege of purchasing the vacant lands within the limits of the cession, at the rate of fifty cents an acre, is granted, on the single condition that the contractors pay the expenses of the survey.

The 11th article further provided that if within the limits ceded to the colony, and before the introduction of the colonists in the number and manner stipulated, the contractors desire to buy the vacant lands, "they shall have the choice to do so, being previously measured by the surveyors of the government, paying half a dollar Venezuelan currency per acre, the expense of the measurements of the lands to be paid by the contractors." By this contract then there was a deed of cession of a large portion of the territory of Venezuela, to be increased indefinitely, at the rate of 100 acres for every immigrant, good, bad, or indifferent, introduced into the country, along with the conveyance, of what is usually reserved in such donations, of a fee-simple title to all the mines within the limits of the cession, including therein everything of value that attaches to or is found in the soil, with no obligation whatever on the contractors to supply a single immigrant, and with the right to purchase vacant lands within the limits of the cession at fifty cents per acre.

Drawn up in solemn form, acknowledged before a notary

and sealed, too, this instrument has all the exterior legal requisites, both at the civil and common law, to protect it from criticism and assault for want of consideration, but it is in fact no contract mutually binding upon the parties; but the concession of a privilege by Venezuela to be availed of or not, and when or never, as Messrs. Beales and Nobles in their discretion saw fit.

Such being the character of this immigration contract, it is to be observed that the Commissioner, Mr. Camacho, exceeded his power in this case as well as in the execution of the steamship contract. Under the power he had authority to contract for the establishment of a *constant current* of immigration into Venezuela, and he had no right to contract for anything else. For the first year of the cession it will be remembered that the planting of one colonist entitled the contractors to one thousand acres of land for the first colonist settled, two thousand for the second, and so on. If at the end of two years they had succeeded in planting two colonists they were then entitled to select one hundred thousand acres of land, mines, and all as defined by the contract; and if at the end of ten years, they had not furnished ten emigrants, but only the half of that number they were at liberty to buy, at the rate of fifty cents an acre, the excess of land remaining over and above the number of emigrants agreed to be supplied. Not only so, but if they saw fit to introduce no emigrants at all; if they believed that the purchase of all the lands within the limits ceded to the colony at a half dollar an acre in Venezuelan currency, would pay them better than the turning of a "constant stream of immigration" into Venezuela, they were at liberty to abandon the colonization scheme altogether, and turn the contract into a land speculation pure and simple.

It is obvious from this statement that the contract did not *provide* for *a constant current* of immigration, and even if that result had been an accidental consequence of what was provided for the terms of the power would not have been

gratified. It was not its intention to leave anything to accident or to a choice between two lines of conduct, as the one or the other might seem best designed to promote the interests of the contractors, but to impose upon Camacho an imperative and absolute obligation, to exact compliance with this condition, as the sole and paramount object of the power. Failure in this, whatever else may have been accomplished, is failure in everything. Recurring now to the question of the lawfulness of the power it may be more than doubted whether Paez, if he had been Supreme Chief, both *de facto* and *de jure*, could have granted such a power. It appears that the constitution of the 31st of December, 1858, was in force when he assumed this character. Title IX of this constitution concerns the power of *congress*, and among these powers, as prescribed in article 64, is the power to decree what may be convenient for the administration, preservation, and alienation of national property, to assist in the immigration and colonization of foreigners, and to encourage by means of legislation and by contracts the navigation and canalization of rivers, the opening of roads, and other works, provided they be of national utility (sections 13, 16, 30). This is a clear devolution of the authority exercised by Paez upon the legislative department of the government, and unless we assume that the supreme chief for the time being, in the possession of the capital and of the province of Caracas, had supplanted completely the constitution, and could exercise in his own person the functions of the executive as well as the legislative department, it is very clear that the authority granted to Camacho was an excess of power in itself as to both contracts.

We have already, in a general way, referred to the distracted condition of affairs at the time he assumed control of the government. and now as a matter of more historical than legal interest, perhaps, it may not be out of place to quote the preamble of the decree of the 10th of September, 1861, under which he took possession of the government as Supreme Chief of Venezuela:

"The people of *Caracas*, to whom entire liberty was left to deliberate in the use of their sovereignty, spontaneously ratified this vote (that of the defenders of society within the *province* of Caracas), and appointed me civil and military chief of the republic, with full power to pacify and reconstruct it under the popular republican form. At La Victoria I was met by the Commission sent to present me the vote of the capital (Caracas) and to request my acceptance. But I feel satisfied, fully satisfied, with the uniformity of the vote of Caracas and of this province (Caracas). I am still ignorant of the will of the republic. National opinion is, and has always been, the guide of my conduct."

Venezuela at that time was composed of twenty-one provinces, Caracas, of course, being the principal one, as the seat of the capital, but there is no inference to be drawn from the mere possession of the capital as to the established character of a government *de facto* claiming to be such. One faction may have possession of the capital to-day, another to-morrow, while the authority of neither is recognized and established as the supreme power of the country over which its jurisdiction extends, or rather over the district each is attempting to extend its jurisdiction. This government lasted about twenty months, and was succeeded by the Falcon administration, which was also in possession of the capital when the contracts were annulled. How much of the habitual respect of the bulk of the people outside of the province of Caracas it managed to acquire before its overthrow we have no means of knowing, but, if the preamble of the decree just quoted affords any reliable evidence of the condition of affairs at that time, there is not much ground for believing that the Paez government was founded on any tenure more reliable than the ability to maintain its authority for a limited period within a circumscribed district of the country.

Such being the internal condition of the country and the war of factions with varying success, the United States, while maintaining relations of intercourse with the state itself, through whatever organ of government might, for the time being, have the ascendancy and occupy the capital, refused to recognize the government of Paez as the *de*

facto government of the state, rebuked its minister for attempting to do so, and promptly repudiated his act. This treatment of the Paez government was in strict accordance with the settled policy of the United States from the organization of the Government.

All questions, said President Jackson, relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of *fact* only, and they have continuously abstained from deciding on them until the clearest evidence was in their possession to enable them to decide correctly.

Message to Congress, 21st Dec., 1836. Repeated by Mr. Forsyth in his answer to the Texan Envoy in 1837.

It is a rule of our courts that the judicial department of the Government in such cases is bound by the action of the political or Executive Department, the same rule which was laid down by the Lord Chancellor of Great Britain in the case of the City of Berne *v.* The Bank of England, before cited.

When a civil war, says Chief-Justice Marshall, rages in a foreign nation, one part of which separates itself from the old established government, the courts of the Union must view such newly-constituted government as it is viewed by the Legislative and Executive Departments of the Government of the United States.

U. S. *v.* Palmer, 3 Wheat., p. 644.
Rose *v.* Himely, 4 C., p. 272.

Besides the case of the City of Berne this doctrine has been recognized in England in several cases directly growing out of transactions with the South American Republics.

In the case of Jones *v.* Garcia del Rio, where a bill had been filed by subscribers to a Peruvian loan for an account, the answer to which admitted that no such government as the

Peruvian government had been recognized by his majesty's government, Lord Eldon said, "what right have I as the king's judge to interfere upon the subject of a contract with a country which he does not recognize?" Turn. and Rus., 1, p. 299. Taylor *v.* Barclay, 2 Sim., p. 213. The Colombian Government *v.* Rothschild, 1 Sim., p. 100; 3 Bing., p. 432.

But if it be replied to this that the question of a *de facto* government in its relations to recognition by other governments is a large question to be determined on considerations of grave public policy, and without straining analogy cannot be associated with the narrower question of private contractual obligations, entered into by a government purporting to be such, as they come for adjudication before an international tribunal like this, which is not bound by the rule of policy referred to, it may nevertheless be answered, that the question of fact involved in the determination of the lawfulness of such a government when its authority is disputed, is a question absolutely necessary to be established before a correct judgment as to the law can be pronounced. While the failure or refusal of the United States to recognize the government of Paez is not binding upon us as a court in determining the question whether that government was a government *de facto* or not, the necessity of determining that question, in some way, as an essential prerequisite absolutely vital to the correct determination of the main issue involved, is just as binding and imperative, as it would be upon any other tribunal empowered to adjudicate the question. In the absence of presumptions, which, in the condition the country was at the time, cannot be made in favor of the lawfulness of the government, resort must be had to evidence to establish its true character, as any other fact in doubt is required to be proved, and on this question of *fact* the failure of the United States to recognize the Paez government is a fact which cannot be ignored.

The argument of the learned counsel for the United States

and the claimants was addressed largely to establishing the proposition that a government *de facto* was invested with the same authority to conclude binding contracts as a government *de jure*, and having succeeded in this, then proceeded upon the pure assumption of the petition that the government of Venezuela was a government *de facto*, when this power was granted; but this, it is not necessary to say, is not only the very question at issue, but the duty of establishing the affirmative rests upon the petitioners.

Ordinarily the authority of the ruling power in a state when the instrument of evidence is once duly authenticated, would not be drawn in question for the reason, as already given, that states are immortal, and in the course of time, according to varying degrees of stability, acquire a fixed personal status like that of an individual, with a capability of binding themselves with a like freedom from question and suspicion. No one would question an authority given under the great seal of Great Britain or the United States, and no one would question the lawfulness of a power emanating from the United States of Venezuela under the happier conditions of government which now prevail in that country.

But in a case like this where no assistance can be derived from presumptions, the petition, must be treated as if it had averred in terms, that the power, in virtue of which these contracts were executed, was itself a deed, not only duly authenticated, as an instrument passing from the hands of its apparent maker, but also as the medium through which the undisputed authority of the state was conveyed, and by which it was bound. A man claiming under a deed must prove it, and if there is any question as to the power of the grantor to do the deed he must establish that also. The mere fact of execution is a matter of formal evidence, but the right to do the act, of which the paper instrument usually called the deed supplies the proof, is the essential issue in controversies of this character. Treating this petition, then, as setting up not merely the paper power to Camacho, but as asserting the

actual authority of Paez to issue such a power, as the foundation stone on which this claim is erected, we are confronted by the general denial which Venezuela has interposed to the petition, and which, under our rules, puts in issue every essential constituent of the petitioner's claim. The question is thus raised whether, conceding that a *de facto* government, according to Austin's definition, has the same authority to bind the state as a government *de jure*, the Paez government can lay claim to such a character, and on this question the burden of proof is on the claimants.

It would be enough to say that they have not discharged this obligation, but from the references we have made to the origin and character of this government, it would seem reasonably clear that if the claimants had assumed to carry such a burden, they must have failed in the undertaking.

But, passing this, it is further to be observed that the clause in both of the contracts, providing for arbitration at Caracas, clearly shows that neither of them, on any pretext, was ever to be made cause for an international claim. It is true that it has been urged in answer to this, that both contracts were struck down by the decrees annulling them, and that the arbitral clause fell with them. But that argument is more specious than real. It is conceded, of course, that one party to a contract cannot break it at his pleasure, and without the consent of the other, but when both parties agree, as in this case, that any doubts, differences, difficulties, or misunderstandings of any class or nature whatever that may arise from, or have any connection with, or in any manner relate to the contract, shall be referred to arbitration, and one of the parties declares that he is not bound by the contract and attempts to annul it, then the attempt to revoke, of necessity, if language has any meaning, being a "difficulty" relative to the contract, must be one of the questions agreed to be submitted. If these contracts had been good and valid in other respects, and the Messrs. Beales and Nobles had demanded that the "difficulty" grow-

ing out of their annulment should be referred to arbitration as provided, and the government at Caracas had refused its assent to the submission, then a question might have arisen whether there was not such a denial of justice on the part of that government as would have warranted the interposition of the good offices of the United States in behalf of the injured parties. No such demand appears to have been made, but the case was submitted to the old Commission under the convention of 1866, and was decided by the Umpire upon the assumption just stated, that the decrees annulled the provision as to arbitration, and thus produced the very result of converting into cause for an international claim, a difficulty relating to the contract which by its terms expressed in the most solemn manner was never to be made such on any *pretext* whatever. A distinction was made in argument between a reference of differences or misunderstandings arising out of the construction of the contracts, and a difficulty as to the existence of the contract itself, it being admitted that a controversy of the first kind was legitimate matter for arbitration, but the second was not, or rather could not be made so, because when the contract was annulled there was no longer any provision for arbitration. But that assumes the right to annul without making the revocation a subject of arbitral decision, and such assumption cannot be made without the further assumption that a difficulty *relative* to the contract does not and was not intended to include a question as to whether there was such a contract. The case seems to us too clear for doubt, and on this ground alone, if there was no other, we should reject the claim.

1. On the whole our conclusions are that by the constitution of Venezuela the lawful and undisputed government of that country could not, by its executive department alone, have granted the power in question, and, therefore, the grant by Paez was without lawful authority, even if the *de facto* character of his government had been established, as to which there is not only a failure of proof but the evidence seems the other way.

2. That both the contracts purporting to have been made in pursuance of the power, contain provisions and stipulations clearly in excess of its terms, and where drawn within the limitations of the power have failed to conform to the prescribed requirements as to the parties with whom the contracts were authorized.

3. That the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as to their legal validity, which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever.

4. That there is no evidence satisfactory to us that the petitioners' testator was interested to the extent of one-third of the claim for the damages alleged to have been suffered by the annulment of the said contracts, or that he ever expended any money or incurred any liability, or did anything in execution of the said contracts; and, treating the petitioners representing their testator as original claimants, we can discover no ground on which to base an award in their favor.

5. That the evidence seems to indicate very strongly that the petitioners' testator came into possession of a single certificate which was found among his papers, by purchase, hypothecation, or some other channel than his interest in the original claim, and if the petitioners are to be regarded as claiming derivatively in the right of *bona fide* holders for value under the 9th section of the treaty, the claim must be rejected, because for the reasons stated the original claim itself is without merit, and falls therefore within the purview of the first article of the supplementary convention. The claim is accordingly disallowed, and the petition dismissed.

LITTLE:

I am constrained, with high respect, to dissent from the third conclusion. The declaration of annulment of the contracts by the Venezuelan Executive was tantamount to a refusal to arbitrate. Declaring the *whole* of the contracts at an end, it, the company had a right to assume, would not countenance action under *any* of their provisions. The Government under the contracts had a voice in the selection of arbitrators. Its action closed the door, therefore, to arbitration; and the failure to resort to that means of adjustment cannot, in my judgment, be rightfully set up as a defence here in its behalf. Still, the contracts being invalid (if for no other reason, because in excess of Camacho's authority, which, being of so high and extraordinary a character, should have been strictly construed, and action confined clearly within its terms), neither the arbitration clauses nor the decrees of annulment are of moment; and I join in the decision.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 15.

[August 5, 1890.]

FINDLAY, for the Commission:

The Commission has no jurisdiction to hear and determine a claim in any case which was not presented to the Government of the United States or its legation at Caracas. While this provision, however, vests the jurisdiction there is no presumption to be made in favor of the *bona fides* or validity of a claim simply from the fact of presentation. The claim now under consideration was presented to the Government of the United States on the 8th day of September, 1855, by Mr. Driggs in a letter addressed to the Secretary of State, in which he enclosed what purports to be an exemplified copy of the original contract or receipt on which it was founded, together with the depositions of two persons alleged to have been the witnesses to the contract, and the deposition of Driggs himself. Copies of these papers were forwarded to the United States Minister at Caracas by Mr. Marcy, with instructions to investigate the case, and to bring it to the attention of the Government of Venezuela if he was satisfied as to its merits. Mr. Eames was Minister at that time, and it appears that he either neglected or refused to intervene. He was succeeded by Mr. Turpin, and after considerable pressure this gentleman, evidently to get rid of the case, turned over the papers before referred to, together with other voluminous *expediente*, to the Minister of Foreign Relations, without a word of either explanation or recommendation, some time in 1859.

The Minister of Foreign Relations in reviewing the papers on the 17th of June, 1859, made an exhaustive reply, summed

up in twelve propositions, the pith of which may be condensed in a single word—fraud.

On this reply there is a minute anonymously endorsed, but apparently in Mr. Turpin's handwriting, in the following words and figures:

"There is no doubt of this being an entirely fraudulent claim put forth by Seth Driggs many years after the death of all the persons interested, and bolstered up by false swearing of Driggs himself in the person of Barnes & Smith, who are *myths*, being no other than Driggs himself swearing in his own behalf and in those names, a practice Driggs is addicted to, and for which he was condemned to 8, 5, and 2 years' imprisonment by 3 tribunals of Venezuela."

There the case rested until Mr. Culver went to Caracas as Minister, when it was revived in a lengthy despatch prepared by him and addressed to the Minister of Foreign Relations on the 16th day of December, 1862.

Driggs, however, in the meantime had prepared himself a long answer to the reply sent to Mr. Turpin, in which he reviewed each one of the twelve propositions before referred to, and this paper is incorporated in and made a part of Mr. Culver's despatch. It cannot be said, therefore, of this claim that it was never presented as required by the convention of 1885, but it is a fact nevertheless that the Government of the United States, through its legation at Caracas, refused to entertain the claim until the papers in the case were dumped into the Foreign Office of Venezuela by Mr. Turpin, under circumstances which show plainly enough that that gentleman was not willing to take the responsibility of either a personal or an official endorsement.

The claim originated in a receipt for merchandise by one Benezer Goodrich from Seth Driggs, under date of May 10, 1835, the goods to be sold at Carupano, in the Province of Cumana or Rio Caribes, as circumstances might dictate, for account and risk of Driggs, on a guaranteed profit of 10 per cent. per annum, to be paid until the goods estimated to be worth $2,000 should be paid for, the remaining profits to accrue to Goodrich, "in consideration of which he guarantees the debts."

The merchandise was to be sold and the proceeds invested in cocoa for export, and in this venture Driggs was to have one-fourth of the profits and the balance to go to Goodrich. The instrument purports to be under seal and is witnessed by "J. Smith" and "S. Barnes."

What the character of the merchandise was does not appear, but it does appear that Goodrich was very unfortunate in disposing of it, because about five months after the date of the receipt, the whole consignment remained intact in the original packages just as it was delivered.

This is established by the evidence of J. Smith, one of the witnesses to the receipt, who, by one of those lucky coincidences which only befall the very fortunate, happened to be present just at the critical moment when his testimony would be of most value to Mr. Driggs, and curiously enough, too, as far as his affidavit shows, without there being any personal business or tie of any kind between them which can account for services so useful and opportune. It appears that this Mr. Smith, who appears to have borne the Christian name of James, was requested by Mr. Driggs to proceed to Carupano sometime in the month of September, 1835, to inquire how Goodrich was progressing with his business, and that in the execution of this commission he visited the town as desired, and there, to quote his own language:

"Saw the goods belonging to Mr. Driggs in the store of Mr. Goodrich in their original packages."

How opportune this arrival of Mr. Smith in Carupano was, may be learned by what immediately follows the above quotation, for he says:

"That two days thereafter, in the absence of Mr. Goodrich who had closed his store on account of the revolution, deponent saw the Government troops in the act of purloining the said merchandise from the store of Mr. Goodrich, and they continued in the violent and felonious act until they had abstracted all the merchandise belonging to Mr. Driggs, and also that belonging to Mr. Goodrich together with all his personal effects, leaving him entirely destitute; that Goodrich declared to the deponent at the time that he had suffered in a loss of more than six hundred dollars in his own right independent of the loss

sustained by Mr. Driggs, besides his prospective gain, and that these acts of violence perpetrated by the troops would prove his total ruin."

These statements appear in what purports to be an exemplified copy of an affidavit made by Smith on the 2d day of July, 1855, before the Hon. Ira Harris, justice of the Supreme Court of New York, in Albany.

His co-witness to the receipt, Mr. S. Barnes, or Samuel, as he is styled in the deposition, comes forward on the 3d of August following, and makes oath before Florence McCarthy, justice of the Marine Court of New York, that it was a matter of common notoriety that Driggs had suffered in the manner related, and that he was employed in one of Mr. Driggs' establishments in the island of Trinidad, at the time indicated. He and Smith both verify their signatures to the receipt and prove its execution.

Three days thereafter, on the 7th of August, Seth Driggs himself appears before the Hon. Charles A. Ingersoll, judge of the District Court of the United States for the Southern District of New York, and makes oath substantially to the same facts, and states that his losses and damages, including interest to the 31st of December, 1855, amounted to the sum of $7,275.00, for which he claimed indemnity.

The receipt, the depositions of Smith and Barnes, and this deposition of Driggs then all appear to have been filed in the clerk's office of the city and county of New York, on the 6th of September, 1855, and on the same day copies were made and purport to be authenticated in a manner which, without explanation, bears upon its face every evidence of fraud. These copies were forwarded by Driggs to Mr. Marcy, then Secretary of State, with a letter under date of September 8, 1855, in which he says he has the honor to "enclose an exemplified copy of certain original documents filed," &c., and it is copies of these copies and of the exemplification which were received at Caracas, the original copy being submitted, for the first time, to this Commission by the Department of State at Washington. We mention this to explain

why no notice was taken by Mr. Turpin or Eames of the very peculiar form in which the exemplification comes before us. In the copy or copies (for there are several) as they appear in the *expediente*, there is nothing in the first part of the record to attract the attention of even a critical observer, because the different papers certified to appear to follow in regular sequence, after the formal caption, some of them being marked by red letters, and then follows the authenticating part of the instrument, but the defect in this is apparent also in the copy.

The first part of the exemplification is a little less than a half sheet of blue paper, on which is printed the usual "greeting," &c., the other part of the paper having been cut or torn off, and this printed paper has pasted on it a circular piece of yellow paper scalloped round the edge and purporting to bear the impression of the seal of New York.

The other papers containing the receipt and depositions are long white sheets of legal-cap paper, with about two inches of the lower left-hand margin cut out, and have no connection with the first paper, except as they are fastened to it by a string.

Then comes the certificate, which is not printed, but written on a blue sheet of paper with an inch margin lined off on the left and cut precisely in the same way as the other papers referred to, only in this case the incision was made through what appears to have been an impression of the seal of New York stamped on the paper, less than half of which remains.

It reads as follows:

"All of which we have caused by these presents to be exemplified and the seal of said Supreme Court hereto affixed."

Then there is the word "witness" without anything further, but on the next line come the words:

"Thomas W. Clerke, *Esq.*, Justice of the City of New York, this 6th day of September, A. D. 1855, and of our independance (sic) the eightieth.

"RICHARD B. CONNOLLY,
"*Clerk.*"

Then follows this certificate :

"STATE OF NEW YORK,)
City and County of New York.)

"I, Thomas W. Clerke, justice of the Supreme Court of the city of New York, do certify that Richard B. Connolly, whose name is subscribed to the preceding exemplification, is clerk of the city and county of New York, and clerk of the Supreme Court of said State for said county, duly elected and sworn ; and that full faith and credit are due to his official acts. I further certify that the seal of said Supreme Court which is thereto affixed is the proper seal ; and that the attestation of the above *judgment roll* (italics ours) is in due form of law."

Then follows the attestation and signature, and on the left of it the mutilated impression of the seal before mentioned. It would be impossible, however, to convey to the mind an exact impression of these papers except through the eye, by actual visual inspection.

The sheet containing an impression of a seal on yellow paper as described, has no signature of any kind authenticating its genuineness, and the last sheet purporting to contain the exemplification, while it is signed by Thos. W. Clerke, has the imperfect stamp of a seal on the paper. Which seal was he attempting to authenticate? If the first, there was no occasion for the second, and if the second, the first was not merely superfluous but out of place. But while the whole copy bears evidence of crudity and awkwardness in its preparation, and presents an unconventional and slovenly appearance, quite impossible to reconcile with the assumption that it actually passed through any clerk's office, as a copy purporting to be exemplified under act of Congress, still less the office of the clerk of New York, there is a blemish, or rather a blunder, patent upon its face, which stamps the paper in the connection in which it is used as a fraud.

The certificate of Clerke, the justice, is that "the attestation of the above *judgment roll* is in due form of law."

Now, not to say anything of the peculiar form of the attestation itself, what clerk or what judge would call the receipt and the depositions of Driggs and Smith and Barnes a judgment roll ? To believe this paper genuine puts that

sort of a tax on one's credulity which, if borne patiently, is apt to stamp the victim as a fool. It looks very much as if a tentative and discarded sheet of paper with the signatures of these officials had been picked up somewhere, and made to do service with the printed blank, which could easily have been detached from some other papers, or might have been procured on one pretext or another not necessary to discuss. However this may be, we simply don't believe, not to put it more harshly, that there is any other connection between the papers except the string which holds them together. And what was the use of the exemplified copy except to give the claim an official sort of coloring in addition to what it already possessed? Each deposition purports to have been taken before judges of State, City, and Federal Courts, and to have been duly authenticated in the mode pointed out by law.

Had they been genuine why were they not sent on to the State Department under the seals of the respective courts out of which they issued? Why take Smith's deposition made in Albany, and Barnes and Driggs in the city of New York, all purporting to be regular in form and duly authenticated by the judges and clerks who performed the service, and file them in the office of the clerk of the county and city of New York, for the purpose of having him say that this had been done. And if this was the object, why didn't he say so instead of attempting to pass them off as an exemplified "judgment roll?" In the absence of proof of a contrary practice, we do not believe that a party can place on file in the clerk's office of the county and city of New York such matter as he pleases with a view merely of obtaining a copy of the papers filed, properly authenticated, to be used as evidence, as emergency may require. We know of no such practice anywhere else, and if it was feared that the originals of these precious documents might be lost in the transmission through the mails, why not leave the original deposition in the court where it was made and take out a copy for use?

If such a practice existed in New York there is no reason, for instance, why the deposition of Samuel Barnes, taken by Justice Florence McCarthy, of the Marine Court, might not have been permitted to remain there, and a copy procured for use at Washington. For some reason the claimant supposed that the distributive effect of three separate and distinct exemplifications issuing out of as many courts, although all combined in support of the same claim, would not equal in probative value the cumulative effect of a single record under one hand and seal; but when it comes to this the question may be well asked what is the value of the testimony in any shape, and assuming it to be genuine, irrespective of the mode of its presentation? Here are affidavits made *ex parte* twenty years after the occurrence of the events to which they depose by two witnesses of whom this Commission knows absolutely nothing, except that all the circumstances surrounding the case go to impeach their testimony.

We don't believe that the goods of Mr. Driggs remained for five months in the store of Mr. Goodrich in Carupano, in the original packages, and that Mr. Smith saw them there on the 5th of October, 1835.

Perhaps if Smith was alive and could come before us and show a stainless reputation for truth and veracity, we might be staggered in the effort to reconcile such a character with such a statement, but as it stands, we simply don't believe it.

There is absolutely nothing in this claim to commend it to consideration.

Originating in 1835, the claimant failed to prepare his proofs until 1845, when some *ex parte* testimony of the loosest kind was taken in Cumana.

Numerous efforts were then made to induce the Ministers of the United States to make it the subject of a diplomatic representation to the Government of Venezuela, but without effect.

Messrs. Ellis, Shields, Steele, and Eames declined successively to interfere.

In 1855 the affidavits of Smith and Barnes were procured and with the affidavit of Driggs and the contract between him and Goodrich were forwarded to Caracas, with a request by Mr. Marcy for investigation.

What the result of this investigation was does not appear, except that Mr. Eames, who was to conduct it, did not present the claim. The next we hear of it is in 1859, when Mr. Turpin treats it with scorn and indignation.

In 1862 it was finally taken up by Mr. Culver, who would seem to have been imposed upon by Mr. Driggs, and then, for the first time, was presented in form to the Government of Venezuela. If it is not a fraud from beginning to end we can only say that the claimant has been very unfortunate in his method of dealing with it. The petition will be rejected and claim disallowed.

Claim of

THE REPRESENTATIVES OF CAPTAIN JOHN CLARK *et al.* *v.* THE UNITED STATES OF VENEZUELA. } *Nos.* 41, 43, 53, & 62.

[August 5, 1890.]

FINDLAY, for the Commission:

The great question in these cases is whether, assuming the lawfulness of Captain Clark's commission, issued by the Oriental Banda, and the unjustifiable snatching of the prey from his talons, by Commander Joly, of the Colombian Navy, the claim can be supported before a tribunal like this, and restitution decreed, without a violation of the principles of sound international law and morality. It is admitted that the courts of the United States would have been bound to order a restitution of the vessels to their proper owners had they been brought within the jurisdiction of that country. This was the ruling in many similar cases of contemporaneous date, most of which are cited in the brief of the learned counsel for the last mentioned claimants, but the law of which was laid down with great clearness and force by the Supreme Court in the earlier case of Talbot *v.* Jansen, in 3 Dal., p. 133.

While, however, it is conceded that the courts of the United States would be bound to respect and enforce the neutral obligations of the country, in any case of seizure arising out of the acts of one of its citizens, under color of a foreign commission, it is contended that when a controversy originates in a trespass of this kind, but does not concern the neutral who has been injured, but only the wrong-doer in his relations to a third party, who quoad him, is a tort feasor also, then the principle does not apply, and there would be no impropriety in the United States enforcing the

claim; although in doing so, it must necessarily sanction a breach of its own laws and the law of nations, and violate solemn treaty stipulations.

It is to be observed that this is not the view of the learned counsel who represents the United States in these cases, and who seeks to establish the responsibility of Venezuela, upon the ground that she has recognized and admitted the claim, and is estopped from disputing its validity or claiming exoneration by reason of the turpitude of the original seizure. With these elements out of the case, we did not understand him as contending that the United States could prosecute a claim of this character without at the same time involving itself in the admission that a violation of its laws, and of the international law, founded upon the strict observance of neutrality as the groundwork of the peace of nations, were matters not worth considering in such a controversy.

It will be admitted that Venezuela has no concern with the question whether the United States holds a strict or a slack rein in the enforcement of its laws in any matter between it and some third party, or its own citizens, and that it does not lie in her mouth to set up as against one of these citizens a plea of turpitude founded on a breach of these laws, and especially as an excuse for the non-payment of money, which, as between her and that citizen, she had no right to appropriate in the first instance and has no right now to withhold.

Captain Clark was either a citizen of the United States, or a citizen of the Oriental Banda, or he was a citizen of both countries. To have any standing before this Commission he must have been a citizen of the United States. If he was a citizen of the United States, however, he could not have been a citizen of the Oriental Banda, unless he can claim a double citizenship of both countries.

Treating him as a citizen of the United States pure and simple, he was clearly a violator of its laws and the law of nations, when he captured on the high seas the property of

persons who were at peace with the United States, and as such violator could have no hearing in the courts of the United States, and certainly can have none before this tribunal.

As a citizen of the Oriental Banda, disentangled from other ties of allegiance, he is excluded from presenting his claim here by the express terms of the treaty, which only covers claims of citizens of the United States. Unless, therefore, a man may lawfully, at one and the same time, be a citizen of two countries, with the right to claim the protection of either, in consideration of the allegiance he owes to each, without regard to the contradictions and absurdities which such an anomalous dual relation involves, the case of Captain Clark must be dismissed. The petition of E. J. D. Cross, adm'r *d. b. n.*, *c. t. a.*, of estate of John Clark, alleges substantially that he was a naturalized citizen of the Oriental Banda. It is a concession in the case that he was born a citizen of the United States. Now, could he be both—a citizen of the Oriental Banda for the purpose of escaping the penalty, prescribed by the law of the country of his nativity, for a violation of its neutrality, and at the same time a citizen of that same country after the very offence was committed—for the purpose of giving him a standing before a Commission organized to hear claims of its citizens with the ulterior purpose of obtaining the fruits of his wrong-doing? Upon this hypothesis he leaves the United States with no intention of renouncing his allegiance, and yet at the same time with the intention of doing so. He becomes a naturalized citizen of the one country with the full purpose and determination of remaining a native citizen of the other. He expatriates himself and yet does not expatriate himself; he is naturalized and yet not naturalized. He bears a commission which the Oriental Banda has a right to issue, but in what character, as citizen of that country or of the United States?

When he captured the *Medea* and the *Reina de dos Mares*, was he a citizen of the United States, or of the Oriental

Banda, or both? If he was a citizen of the United States it would have been its duty to protect him in his captures and wrest them out of the possession of Commander Joly, and wrest them, too, not for the purpose of restoring them to their owners, but to establish the right and possession of Captain Clark. In doing so, if such a thing were conceivable, the United States would have protected an offender against its laws, and at the same time involved itself in war with both Spain and Portugal. No one pretends that any attempt on the part of the United States to support the claim of Captain Clark at the time would have involved it in absurdities and serious consequences less extreme. On the other hand, if the Captain was a citizen of the Oriental Banda, proceeding under a letter of marque regularly and lawfully issued by that country, then it is clear that the United States owed him no duty, and that he must look to the country of his adoption for whatever protection he required. The idea that at one and the same time he could accept and hold this commission as a citizen of both countries, is simply preposterous.

Again the burden of proof is on Captain Clark, or those claiming under him, to establish the fact of his expatriation, as a man must be a citizen of some country, and cannot be an irresponsible nondescript, such as a citizen of the world, without the rights and corresponding obligations which spring from an established political status. He will be presumed to be a citizen of the country which has given him birth until he has established by satisfactory evidence the fact of his naturalization and adoption as a citizen of some other country. Until this is done, and the fact of his expatriation satisfactorily demonstrated, he cannot escape the consequences of the violation of the laws of the country from which he has emigrated, nor can that country escape responsibility for his acts. He may go so far as to take an oath of allegiance to another sovereignty, and then accept its commission, and yet not lose his character as citizen of the

United States, so as to be amenable to its laws. (Talbot *v.* Jansen). Now in this case it is contended, on the one hand, by the representatives of Adams, the assignee of one-fourth of this claim, that Clark was born a citizen of the United States, made the captures as such, and died still bound by the ties of allegiance to his native country. On the other hand, to escape the consequences of this dilemma, his own immediate representatives set up the claim that he was a citizen of the Oriental Banda; but in doing so, plainly put themselves out of Court, or rather erect an insuperable bar that prevents them from getting in. The difference in the attitude of the respective claimants is, that one class secures a *locus standi*, by the requisite jurisdictional averment, but in the course of the proceedings commit suicide, whereas the other class do not so much as cross the threshold of the Court.

It was contended that the United States had adopted this claim, and in a long course of diplomatic correspondence maintained its validity against Venezuela, and that by so doing, whatever turpitude affected the original transaction as between it and Clark, had been cleansed and condoned, and as it was the only party which could justly complain of his acts, the condonation had the effect of a full pardon and restored him to all his rights, more especially as against Venezuela, which had appropriated his property by the strong hand and without the slightest color of claim. Put the case then in its strongest light and assume that Clark, on his return to the United States, had been prosecuted for a violalation of its neutrality laws, in accepting a commission to depredate upon the commerce of a country with which the United States were at peace, and after conviction had been pardoned, Could this Commission award restitution to the claimants as prayed? Clearly not. This is not a United States court, in which the pardon of the President under the seal of the United States could be plead. The offence in this case was not a mere breach of the municipal law of the

United States, within the reach of the pardoning power of the Executive, but was essentially and distinctively an offence against the law of nations, beyond the competence of any power to pardon or condone. It is an elementary principle of this law that when nations are at peace all their citizens and subjects are at peace, and *vice versa;* war involves all alike in a common hostility. As a necessary deduction from this principle the right to make war is vested in the sovereignty and is taken away from the individual.

To permit the individual citizen to make war upon a foreign citizen or subject, whenever he considered himself aggrieved, would be destructive of the peace of nations, just as in the same sense, though on a much more limited scale, to permit each member of society to take the law in his own hands, would subvert the very foundations of social order. Treaties and municipal laws which recognize this principle are only declaratory or expository of the law itself, which is founded in international necessity.

When Captain Clark, therefore, sailed in the *La Fortuna*, under a commission which authorized him to prey upon the commerce of Spain and Portugal, he still retaining his citizenship of the United States, which was at peace with both of these countries, he was embarked on a cruise which, if it did not constitute him a pirate, was at least a continuing trespass in violation, not only of the law of his own country and of the treaty with Spain, but of the law of nations.

Had he been arrested and taken into custody by the Spaniards his defence, doubtless, would have been that he was a citizen of the Oriental Banda, and as such protected by his letter of marque. He certainly would have made no attempt to defend upon the ground that he was a citizen of the United States, for the moment he did so he would have been punishable as a pirate for the offence against Spain under the treaty between that country and the United States. For his own protection, as well as the peace of nations, it was

absolutely necessary that his status should have been defined with absolute precision.

It is conceded that in the state of the law with respect to expatriation, when Captain Clark left the United States it would have been impossible for him to have renounced his allegiance to that country in accordance with any prescribed statutory mode, for the reason that Congress had never legislated on the subject. And yet, still, if he had left his own country for a lawful purpose, and with the deliberate design of being naturalized in another, and in good faith, evidenced by continued residence, had become a citizen of the country to which he had emigrated, it is not doubted that as to all acts subsequent to his naturalization he would be treated as a citizen of the country of his adoption. But he not only failed to demonstrate his expatriation by such open and accepted tokens as were available to him, but the claim now set up by his representatives is, that it was not his intention to expatriate himself at all; that he never removed his family from the United States; that they continued to reside in the city of Baltimore, and that he also resided there except when holding a commission in a foreign service. The brief of the learned counsel for the Adams claimants says, on p. 17, that—

"It is incontestable that Captain Clark was a native citizen of the United States residing in Baltimore all his lifetime except for the two brief periods before referred to, and the time he was on the high seas under a commission from President Artigas."

Then for the purpose of showing that he was treated as a citizen of the United States, notwithstanding his acceptance of service under another flag, the case of the *Bello Corunnes* in 6 W., p. 152, is cited. In that case there was another Baltimorean, Captain Barnes, who commanded the privateer, the *Puyerredon*, bearing the flag of the Buenos Ayrean Republic. He had assumed the character of a citizen of the power that had commissioned him; captured the *Bello Co-*

runnes, a vessel belonging to Spaniards, off the southwest coast of Cuba, and which, in a pretended endeavor to reach a port in the United States, was stranded on Block Island. There were three classes of claimants who intervened in the proceeding instituted in the United States Court for the condemnation of the vessel for a violation of the trade laws of the United States.

These were, the Spanish Consul for the owners; the salvors; and Captain Barnes, as the captor; and the Court, in speaking of the latter's claim, after showing that the *Payerredon* was American owned, says:

"But they are also of the opinion that she must be held to be American commanded, since even if the doctrine could be admitted that a man's allegiance may be put off with his coat, it is very clear that Mr. Barnes' citizenship is altogether in fraud of the laws of his own country."

Then is added the paragraph quoted in the brief:

"His family has never been removed from Baltimore, and his home has been always either there or upon the ocean."

It will be observed that Captain Barnes, clearly perceiving that his claim to recovery could only be founded on his citizenship of Buenos Ayres, claimed in that character and right only, just as in the present case, the immediate representatives of Captain Clark differing from the representatives of his assignee, Adams, claim that their ancestor was a citizen of the Oriental Banda. In all probability the cases of Clark and Adams, with respect to citizenship, were precisely the same. Both were citizens of the United States by birth, and both had a merely colorable citizenship of another country, and both, to repeat the language of the Court just cited, were making use of it, "in fraud of the laws of their own." The argument of the learned counsel is addressed altogether to the point of establishing Clark's citizenship of the United States, and in this connection he says, that it is "hardly worth an argument to demonstrate the absurdity of

the contention. * * * that a citizen of the United States forfeits his citizenship by a violation of its laws."

Having established this point, and brought Clark within the letter of the treaty, he seems to forget that in administering justice, which is the prime function of this Commission, there is a more important question to be examined than Clark's citizenship, and that is, the character of the claim itself. It is just because Clark was a citizen of the United States, and in that character committed acts of hostility against the citizens of another country, with which his own was at peace, that prevents us from considering his claim. It would be very absurd indeed to hold that a citizen forfeited his citizenship by a violation of the neutrality of his country, but it is quite true and proper to maintain that no man shall invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrong-doing.

If authority is needed on so obvious a proposition, founded alike on sound law and sound morality, it can be found in the case of the *Bello Corunnes*, just cited.

The fact that the defendant against whom reclamation is sought, is a wrong-doer also, does not alter, but only serves to give point to, the principle. Admitting to the fullest extent that Venezuela or Commander Joly was a flagrant trespasser in depriving Clark of his captures, that the commission he received was regular and lawful in all respects, and that the Oriental Banda, under whose flag he sailed, was invested with full belligerent rights, among which privateering was unquestionably one at the time of these occurrences, the stubborn fact still remains, that Clark himself, the party through whom these claimants derive title, was a flagrant trespasser also, if, indeed, a harsher term might not be justly applied in characterizing his spoliations. It is not necessary for Venezuela to make the defence, it is the duty of the Court, *sua sponte*, to apply the principle whenever the

record discloses a fit case for its application. Oscanyàn *v.* Armes Co., 103 U. S., p. 261.

As between Venezuela and the claimants, outside of the duty to make restitution to the owners in the case of the vessel belonging to Portugal, with which Venezuela was not at war when the capture was made, there is a strong equity, appealing for relief. Venezuela or Colombia was at war with Spain, and so far she was embarked in a common cause with the Oriental Banda, and crippling the commerce of the common enemy helped the cause of both. The seizure of the *Medea*, a Spanish vessel, by Joly, under these circumstances was an ungenerous act, and the refusal of Venezuela to refund the value of this capture, after the Oriental Banda had waived whatever claims it had in favor of Clark, would have been dishonorable. But Venezuela, it appears, has actually paid the full amount of both claims, although the parties to whom payment was made, and some other circumstances connected with her conduct in the matter, have been made the subject of severe animadversion by the representatives of the United States at Caracas. With the view we take of the main question it is not necessary to discuss this branch of it. Whether payment was made or not, or whether Venezuela is bound to pay what, as to a part of the claim, "might be considered a debt of honor," are questions quite apart from any matters which, we think, are proper for us to consider. Captain Clark was a citizen of Maryland, as well as of the United States, and although his rights and duties with reference to other countries are to be ascertained and established by his character as a citizen of the United States, which is the sovereignty of external communication in that dual Republic, yet still, the law of his own State, as expounded by its highest court in a case similar to his own, ought not to be without significance and effect. The case of Gill, Trustee, *v.* Oliver's Executors has been referred to and is cited by counsel in his brief, p. 27. It is reported in 11 H., p. 520, and came up on writ of error from the Court of Appeals of

Maryland. The question involved was, Whether a trustee in insolvency should have the proceeds of a certain award made by the Mexican Commission under the convention of 1839, in favor of one Goodwin, or whether they should go to the executors of Oliver, to whom he had made an assignment of the claim.

The claim originated in the supply of muskets and munitions of war under a contract with General Miña by the Baltimore Mexican Company, executed in Maryland in 1816. Goodwin became insolvent in 1817, and Gill was appointed trustee in 1837. Under the laws of Maryland all the property, rights, and credits of the insolvent, of whatever kind, passed to the trustee. The Mexican Commission made its award in the Goodwin case in trust for the parties interested, in 1839. In the meantime Goodwin had sold the claim to Oliver, and died. At the time of the award, therefore, there was an outstanding transfer of all Goodwin's property as of the date of 1837 in Gill, trustee, and a sale of the Mexican claim to Oliver, and the question was, as stated, Who should have the money, the trustee, or the executors of Oliver, who had died before the case got into the courts?

For some reason the Maryland Court failed to have the case reported; but in a subsequent case, involving the same questions, which went up to the Supreme Court from the Circuit Court of the United States, it appears that that Court had the record of the former case, which contained the decree of the Maryland Court, before them, and quote from it as follows:

"They (that is, the Court of Appeals of Maryland) are of the opinion that the entire contract (the Miña contract) upon which the claim of the appellee (Gill, the trustee) is founded, is so fraught with illegality and turpitude as to be utterly null and void, conferring no rights or obligations upon the contracting parties, which can be sustained or countenanced by any court of law or equity in this state; that it has no moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such claim does not pass to or vest in the trustee of the insolvent debtor."

It would be difficult to employ much stronger language, and yet every word is applicable to the present claim, because the Court finds all this illegality and turpitude to flow from a breach of neutral duty. The case referred to is the case of McBlair *v.* Gibbs, 17 H., 249; 21 Curtis, p. 479. The original case of Gill, Trustee, &c., in 11 H., was dismissed for want of jurisdiction, because the Court did not find that there was any question involved under the judiciary act on which a writ of error could be founded. The decision of the Maryland Court was thus left to stand, and he would be a bold man who would undertake to maintain that it can be shaken, either on principle or authority.

It is well known that the Chief-Justice (Taney) did not agree with his brethren as to the jurisdiction of the Supreme Court, and afterwards filed an elaborate dissenting opinion, in which he reviewed the controversy, growing out of these Mexican claims, at great length. In the course of this opinion, in speaking of the action of the Commission in allowing the claims, he says:

"Of course it was their duty not to allow any claim for services rendered to Mexico or money advanced for its use by American citizens in violation of their duty to their own country or in disobedience to its laws. For the Government would have been unmindful of its own duty to the United States if it had used its power and influence to enforce a claim of that description or had sanctioned it by treaty." (Williams *v.* Gibbs, 17 H., 262; 21 Curtis, 492.)

We do not understand that the observations of Justice Grier, quoted in the brief, are at all in conflict with this opinion of the Chief-Justice. Doubtless the risks taken by the Mexican Company, in Baltimore, in furnishing military supplies to General Miña ought to have enhanced the justice and equity of its claims against the *New Government of Mexico*, which had its origin in the revolution begun by Miña. The court, as we understand it, besides making what was an extra-judicial utterance, the case having gone off on a point of jurisdiction, only means to say that the Mexican

Government, in 1825, did a very proper and honorable thing in recognizing the justice of these claims.

So here we might express our individual opinions that Venezuela is in honor bound to make restitution, provided, of course, she has not already done so, by an appropriation for not only this claim, but also that arising out of the seizure of the Portuguese vessel. But we have said enough on this subject, and whatever may be the duty of Venezuela, being strongly of the opinion that the claimants have no standing before this Commission, their petitions will be dismissed and claims rejected.

Claim of

WM. H. ASPINWALL, Executor of G. G. Howland and others,
v.
THE UNITED STATES OF VENEZUELA. } *No.* 18.

[August 6, 1890.]

LITTLE, for the Commission:

The immediate basis of this claim is 366 debentures of 500 pesos each, executed and delivered, 1839, by Venezuela to Gardner G. Howland and Samuel S. Howland, citizens of the United States, doing business in the city of New York, under the firm name and style of G. G. & S. S. Howland, in exchange for 406 obligations of like amount each, issued by the old Republic of Colombia to, or obtained by, said firm in 1829, and forming a part of that portion of the Colombian public debt for which Venezuela became responsible under the convention of settlement of 1834–5, among the States which had formed that Republic.

Each bill with indorsement, reads as follows:

DEUDA CONSOLIDABLE DE VENEZUELA.

Número ———. Pesos 500. Fol. 6.

Deuda Consolidada. Interes 5 por ciento.

La Républica de Venezuela reconoce á favor del portador el capital de quinientos pesos procedentes de créditos contra Colombia con el interes de cinco por ciento el año desde primero de Enero de mil ochocientos veinte y siete.

Caracas 15 de Setiembre de 1839.

Republica de Venezuela.

G. Smith. Ml. Echeandia. Vicente Lecuna.

[Endorsed.]

Recibido y anotado bajo el No. 10 del Libro respectivo.

PEDRO MANUEL FIRADO.

Es Conforme.

El Secretario de Hacienda,

CADENAS.

El Director,

MANUEL A. CARREÑO.

El Vocal,

PEDRO NARANJO.

{ Seal of "Comis. Liquid. de Cred. Contra el Estado. 1859." }

[Translation.]

CONSOLIDABLE DEBT OF VENEZUELA.

Number ———. 500 dollars. Fol. 6.

Republic of Venezuela.

Consolidated debt. Interest 5 per cent.

The Republic of Venezuela acknowledges itself indebted to the bearer in the sum of five hundred dollars, arising from the debt of Colombia, with interest at five per cent. per annum from the first of January, one thousand eight hundred and twenty-seven.

Caracas, September 15, 1839.

G. Smith. Ml. Echeandia. Vicente Lecuna.

Received and entered under No. 10 of the respective book.

PEDRO MANUEL FIRADO.

Correct:

CADENAS,

Secretary of the Treasury.

MANUEL A. CARREÑO,

Director.

PEDRO NARANJO,

Vocal.

{ Seal of the "Commission for the Liquidation of the Debt of the State. 1859." }

No part of these bills has been paid, and they are still owned by American citizens, claimants here.

The question first arising fully and ably argued by counsel for the United States and the claimants, though not urged by counsel for Venezuela, is as to jurisdiction. "Claims" only being submitted to this Commission, do these obligations come within the meaning of that term? The distinguished Umpire of the Mixed Commission created under the convention of 1857 between the United States and New Grenada for the settlement of claims against the latter of citizens of the former, and in which the language of submission was, *mutatis mutandis*, identical with that of the present treaty, held, 1864, that "bonds" of New Grenada were not "claims" under the convention, and therefore not within the jurisdiction of that Commission.

If his conclusion was correct, it perhaps would follow that these bills do not constitute a "claim" under the present convention, although we are not advised whether New Grenada made a defence, on the merits, to the bonds in that case, as is done here.

Perhaps as good a way as any to discuss this question is to review, by paragraphs, the Umpire's opinion.

He says (italics ours):

"The high contracting parties in substituting to themselves a special tribunal for the settlement of certain matters *at issue* between them, do not thereby divest themselves of their power to treat directly and in the ordinary manner all questions which are not *expressly* submitted to the Commission so established in their stead."

The implication here that only matters "at issue" between the two governments are for "settlement" would seem to lack support in the terms of the treaty. The language of submission is:

"All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to *their* government or to *its* legation at Caracas * * * shall be submitted," &c.

It will be observed there is no requirement that matters submitted shall have been "at issue," if by that is meant an assertion of the claim by one government and a

denial of it by the other, or any existent controversy between the two concerning it, unless such is implied in the word "claims" itself.

While it seems probable both governments knew, because it was their concern to know, just what claims were embraced within the terms of designation used, there is nothing in the language to indicate or require actual knowledge. A claim filed with the American legation at Caracas within the time limited, although unknown to either government in fact, and therefore not at issue between them, is brought by the terms of the treaty as fully within the competence of the Commission as if it had been the subject of heated controversy between the two powers.

Moreover, if a claim so filed arose *ex delicto* it would not necessarily follow that Venezuela would or could take issue respecting it; and if, on the other hand, it pertained to bonds it would not therefore result that she might not controvert it. Thus, if the test of submission were whether the demand had been "at issue" or controverted, or even controvertible in fact, it might happen that some claims sounding in tort would be excluded, while others arising on contract, as bonds, would be included. Under such a rule these bills being resisted on the merits, and therefore "at issue," would be embraced.

It is true the high contracting parties have not divested themselves of their power to treat directly and in the ordinary manner, questions not *expressly* submitted to the Commission, as they have not indeed respecting any submitted, whether expressly or otherwise. Resort to a judicial agency to determine questions does not prevent the parties from determining them themselves if they choose to do so. But it is not perceived how the proposition aids the contention. To assert that bonds are among the "questions" reserved by the governments from the operation of the treaty, is merely another form of asserting they are not "claims." It does not advance one towards a conclusion.

He continues:

"Moreover, in all cases in which reasonable doubt exists as to its competence, and especially in those now under consideration, which interest directly the credit and the good faith of one of the contracting parties, the Commission is bound to consider its powers in a limited and not in an extensive sense."

How the exercise of jurisdiction could have injuriously affected the credit *and* good faith of the defendant State in that case, or how it could so operate in this one, is not apparent. Certainly the thought is not that the conservation of credit and good faith is involved in avoiding old promises that new ones may be the better kept.

But does construction of terms in a treaty become a question of convenience to one of the parties? Is it to be inferred that if the *fisc* of New Grenada had been prepared to meet all her bonded indebtedness a different interpretation of "claims" might have been called for, or allowable?

In Hall *v.* Franklin, 3 M. & W., 259, Lord Abinger said:

"We have been strongly pressed with the inconveniences that may result from the construction of the statute. We are not insensible to them; but the only proper effect of that argument is to make the court cautious in forming its judgment. We cannot on that account put a forced construction upon an act of Parliament."

If we understand the Umpire, and it be permitted to deduce a general rule of treaty interpretation from his enunciation, when words of jurisdiction are used having a wide and a limited signification, the latter is to be taken where there is room for reasonable doubt as to which was intended. In other terms, jurisdiction must be denied in all cases unless its existence is manifest beyond a reasonable doubt.

Such does not seem to us to be in accordance with the scheme of either treaty. The very fact that the Grenadian convention provided for a reference of questions of jurisdiction (and others) about which the two Commissioners might disagree, to an Umpire for decision, is of itself a recognition that jurisdiction might properly be declared and exercised in cases of reasonable doubt as to its existence. For it could

not be presumed that questions would be referred as to the proper decision of which there was no reasonable doubt; nor anticipated that, in case of reference, the decision would be against jurisdiction rather than for it. Were the rule as claimed, the Umpire's duty would have been merely nominal; in fact, there would have been no need of an umpire. A disagreement would *ipso facto* presumably have been made to work defeat of jurisdiction. So under the present treaty, the fact that a majority of the Commissioners may decide in favor of jurisdiction against the judgment of the minority, implies in itself the contemplation of reasonable doubt touching the correctness of the conclusion reached in any case of such difference. Had the other rule been intended, a division would have been made, we may well assume, to work exclusion of jurisdiction.

The argument of the Umpire here seems to proceed upon the hypothesis that the language of submission is of doubtful import; that it is susceptible of two constructions—one inclusive and the other exclusive of bonds and like contractual obligations. Even were this the case, it is more than doubtful whether his conclusion could be supported upon principle or authority.

His reasonable-doubt rule, and especially when the doubt springs from circumstances outside the terms and revelation of the instrument itself, is not sustained, we think, by publicists generally. Rules of treaty interpretation, as laid down by them, apply alike to all portions of the instrument. Jurisdictional parts are not construed differently from other parts. In fact, the language of treaties kindred to these, is in a large sense jurisdictional throughout, for it is definitive of authority.

The following passages from Vattel's Chapter on Interpretation of Treaties (Book 2, ch. 17) are believed to be universally recognized as law,* (emphasis ours):

* Wheaton, Elem. Int. L., 1857, 355; Grotius *De Jur.*, ac Pac., Book 2, Ch. 16; Hall, Int. L. 281.

"The first general maxim of interpretation is, That it is not allowable to interpret what has no need of interpretation. When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures in order to restrict or extend, is but an attempt to elude it. If this dangerous method be once admitted, there will be no deed which it will not render useless."

"Since the sole object of the lawful interpretation of a deed ought to be the discovery of the thoughts of the author or authors of that deed, whenever we meet with any obscurity *in it* we are to consider what *probably*"—not what beyond a reasonable doubt—"were the ideas of those who drew up the deed, and to interpret it accordingly."

"In the interpretation of treaties, compacts, and promises we ought not to deviate from the common use of the language unless we have very strong reasons for it. In all human affairs where absolute certainty is not at hand to point out the way *we must take probability* for our guide. *In most cases it is extremely probable that the parties have expressed themselves conformably to the established usage;* and such probability ever affords a strong presumption, which cannot be overruled but by a still stronger presumption to the contrary."

"Words are only designed to express the thoughts; thus, the true signification of an expression in common use is the idea which custom has offered to that expression. It is then a gross quibble to affix a particular sense to a word in order to elude the true sense of the entire expression."

Says Grotius:

"If there is no conjecture which leads another way, words are to be understood from their propriety, not in the grammatical sense springing from their origin, but according to their popular sense." (*De Jure*, ac. Pac., 2, Ch. 16.

If then, as appears, and as President Woolsey sententiously puts it, "the ordinary *usus loquendi* obtains, unless it involves an absurdity," there would seem to be no room to doubt that the word "claims" of itself comprehends overdue bonds or bills. The two leading lexicographers of the English tongue define "claim" and "claimant," as follows:

Webster:

"CLAIM, 1. A demand of a right or supposed right; a calling on another for something due or supposed to be due. 'Doth he lay *claim* to thine inheritance?'—*Shak.* 2. A right to claim or demand; a title to any debt, privilege, or other thing in possession of another. 'A bar to all *claims* upon land.'—*Hallam.* 3. The thing claimed or demanded; that to which anyone has a right, as a settler's claim.—[U. S. and *Australia.*] 4. A loud call (*obs*).

"CLAIMANT, 1. One who claims; one who demands anything as of right; a claimer. 2. A person who has a right to claim or demand."

Johnson:

"CLAIM, 1. A demand of anything as due. 2. A title to any privilege or possession in the hands of another.

"CLAIMANT. He that demands anything as unjustly detained by another."

The corresponding word in the Spanish text, *reclamacion*, is thus defined by Spanish authors, translated:

"RECLAMATION—The act and effect of claiming, *Reclamatio*, 1. The opposition or contradiction which is made to anything as unjust, or by showing that it contradicts itself, *Reclamatio, oppositio.*

"2. The demand made for anything by him who has the right of property in it against him who possesses or denies it.—Salva.

"RECLAMATION (claim). The opposition or contradiction that is made in words or in writing against anything as unjust, or by showing that it contradicts itself; and the claim or demand for anything by him who has the right of property in it against him who possesses it." [Escriche—Dic. of Legislation.]

Should there appear to be a meaning in the word of one language not found in that of the other, of course it should be disregarded, and only that meaning taken which is common to both.

Equally comprehensive is the term, if its legal sense is sought.

Mr. Justice Story, speaking for the Supreme Court of the United States, in Prigg *v.* Pennsylvania (16 Peters, 615), said:

"What is a claim? It is, in a just juridicial sense, a demand of some matter as of right, made by one person upon another to do or to forbear to do some act or thing as a matter of duty."

Lord Chief-Justice Cockburn, in Queen *v.* The Guardians, (9 L. Q. B., 395), held that an order of a court upon a public authority to pay a designated sum of money weekly was a "debt, *claim*, or demand" within the meaning of statute of limitations. Blackburn, J., in the same case, said "claim or demand" would "cover every thing."

Deady, J., of the Circuit Court of the United States, construing the word as used in an act of Congress, held this language:

"In my judgment a claim *upon the United States* is something in the nature of a demand for damages arising out of some alleged act or omission of the Government, not yet provided for or acknowledged. As the term imports it is something asked for or demanded on the one hand and not admitted or allowed on the other (*Worcester*, *Bouvier*—Claim). When the demand is admitted or provided for by law, it is not a mere claim, but a debt. It no longer rests in mere clamor or petition, but is something due upon which an action may be maintained" (Dowell *v.* Cordwell, 4 Saw., 228).

The qualifying words "upon the United States" distinguish this definition. United States obligations about which there is no contention are paid on demand without controversy. The distinction, however, here taken between "claim" and "debt," while not against this claim, is not a recognized one in treaty expression. In the convention, 1803, between the United States and France, "for payment of sums due" from the latter to citizens of the former, provision was made for the settlement of demands of all kinds, which were denominated indiscriminately "debts" in one part of the instrument, and "claims" in another.

Claim is the generic term employed in the legislation of the United States to express every form and character of demand that one can urge against another. It would seem quite superfluous to cite particular statutes or authority.

So in British legislation. The Vice-Admiralty Courts, by act of parliament, June 8, 1863, for illustration, had their jurisdiction defined, for the most part, by the use of the very word in respect of every matter, whether arising *ex contractu* or *ex delicto*, brought within their cognizance. That jurisdiction was extended to:

"(1) *Claims* for seamen's wages; (2) *claims* for master's wages; (3) *claims* in respect of pilotage; (4) *claims* in respect of salvage of any ship or of life or of goods therefrom; (5) *claims* in respect of tonnage; (6) *claims* by damage done any ship; (7) *claims* in respect of bottomry; (8) *claims* in respect of any mortgage where the ship has been sold," &c., &c.

Reference is also made to Laws of Venezuela, 1864, vol. 2, p. 326.

It is laid down, it is true, by recognized authority that where language is employed in a treaty which is susceptible of two meanings, "that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted. For, in securing a benefit, he ought to express himself clearly."*

There does not appear to be ambiguity, or lack of clear expression here, however, in the language of submission. Were it otherwise it could not be said that these "claims" are submitted to arbitration more for the benefit of one party than the other. It was expressly done to "preserve unimpaired as *reciprocally desired* the good understanding of both nations."

And, again, the general doctrine just stated would be subject to modification by this principle, announced by Mr. Justice Story, on behalf of the Supreme Court of the United States, in Shanks *v.* Dupont (3 Peters, 249), which is thoroughly imbedded in the jurisprudence of the United States and is believed to be internationally a sound one, to wit:

'That where a treaty admits of two constructions: one limited and the other liberal, one which will further and the other exclude private rights, the most liberal exposition should be adopted.'

It was affirmed in recent years by the same high authority in the case of Hauenstein *v.* Yuhlon (100 U. S., 483), Mr. Justice Swayne speaking for the Court, as follows:

"Where a treaty admits of two constructions, one restrictive as to rights that may be claimed under it and the other liberal, the latter is to be preferred."

This finds support, if any were needed, in what Grotius says:

"In the things which are not odious words are to be taken according to the general propriety (*totam proprietatem*) of popular use, and if there are

* Woolsey Int. L., § 113.

several senses, according to that which is widest." (*De Jure ac pac.* Bk. 2, ch. 16.)

The qualifications of the general term, "Claims," may, perhaps, within the limits of fair construction, be regarded as if embodied in a proviso. The treaty would have meant the same had it read: All claims of citizens of the United States, &c., shall be submitted to a new Commission; provided they shall have been presented to the Washington Government, or to its legation at Caracas, before August 1, 1868. It is a rule of construction, generally recognized, that a proviso is to be construed, so that the general enactment shall admit of the fullest operation possible, consistent with the terms of restriction.

The Supreme Court of the United States in United States *v.* Dickson (15 Peters, 165), held this language:

"We are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that when the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms."

In the contemporaneous case of Minis *v.* United States (Ib. 445) the same Court said:

"The office of a proviso generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misrepresentation of it, as extending to cases not intended by the legislature to be brought within its purview."

Almost in the language of the Court it can be said: The office of the qualifying words relative to "claims" in the treaty is to except demands from the general terms "All claims" and to qualify and restrain their generality. And it would seem to be of little moment in what form those qualifying words were put; whether in that of a proviso or that in which they stand. The principle of construction would be the same—that being that the qualifying words are, while the general terms of submission are not, to be taken in a restrictive sense, if there is to be any distinction.*

---

* R. *v.* Taunton, St. James 9 B. & C., 836; Voorhees *v.* Bank, 10 Pet., 449; Wayman *v.* Gauthord, 16 Wheat., 30; Bond *v.* U. S., 19 Wall., 227.

The comprehensive term, claims, is the one always employed in similar claims treaties, though sometimes with a synonym—or as near that as the language affords—and is always accompanied with words of restriction.

The restriction relates to ownership, time, origin, character, or circumstance, or to several of these. Under the convention between the United States and Ecuador, 1864, ownership was the only qualification. It was competent to present any claim before the Commission against either state, provided it belonged to a *citizen* of the other. In the treaty of 1834, between the United States and Spain, a single circumstance determined admissibility, to wit: That the claim had been "preferred by each party against the other." Usually several of the elements are embraced in the terms of qualification.

The treaty of 1795, between the powers last mentioned, comprehended in them ownership, time, and character. The claims for adjustment there were "for losses sustained by *citizens* of the United States in consequence of their vessels and cargoes having been *taken* by the subjects of his Catholic Majesty *during the late war* between Spain and France."

In 1832 the United States and the Two Sicilies treated for an indemnity to be paid by the latter to American merchants "for losses inflicted upon them by Murat by the depredations, seizures, confiscations, and destruction of their vessels and cargoes in the years 1809, 1810, 1811; and 1812." Here are the elements of ownership, time, origin, and character.

All the five elements named are embraced in the qualifying terms of the "Alabama Claims" treaty of 1871. It is unnecessary to particularize, or to illustrate further. But attention may be directed still to two conventions under this head, that of 1802 between the United States and Spain, embracing the qualifying elements of time, ownership, and character, and that of 1864 between France and the Republic of Venezuela, comprehending the two latter only.

In the former treaty, provision by reference to a commission on behalf of individuals of both countries, was made for the adjustment of "the claims which have arisen from the excesses committed during the late war by individuals of either nation, *contrary to the laws of nations*, or the treaty existing between the two countries." In the latter, provision was made for the settlement of "claims of French subjects for expropriations, damages, and injuries of the nature of those for which, *according to the law of nations*, the Government of the Republic is responsible."

In these two treaties there would seem to be an implied recognition by each of the parties to the present treaty, scarcely less strong than if expressly stated, that in order to restrict the term "claims" in a treaty to those demands which either State, on behalf of its citizens, would diplomatically press against the other, it must be so nominated in the instrument.

In the treaty under which we sit there are but three qualifying elements embraced; ownership, circumstance, and time. The claims must be those of citizens of the United States. The circumstance of their having been presented to the Government of the United States, or to its legation at Caracas, before August 1, 1868, must exist. And, of course, the claims must have existed before that date. The element of character is wholly wanting.

Would it not constitute a material change in the treaty to insert a qualifying phrase fixing the character of the claims contemplated; such, for instance, as that embraced in the last two treaties quoted from or such as would distinguish torts from contracts?

On an indictment for forgery where the evidence must establish guilt beyond a reasonable doubt, could it be maintained that the interpolation after the words "all claims," of the phrase "for which according to the law of nations the Government of Venezuela is responsible;" or of the phrase taken from the United States–Mexican treaty of 1868, "of citi-

zens arising from injuries to their persons or property;" or of the phrase "not arising *ex contractu*;" or of the phrase "not including any bills, bonds, or other like evidences of debt," would not constitute a material alteration of the instrument?

Considering that it is common in such treaties as this among nations to qualify the word "claims" by indicating the character of the demands to be adjudicated or adjusted by descriptive or apt words, does there not arise a clear implication that where such qualification is omitted none was intended? The principle announced by the Supreme Court of the United States per Marshall, C. J., *in re* "The Nereide," 9 Cranch, 419, seems internationally sound and applicable here. The Court said:

"Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations" [and of course by their own], "and cannot be supposed either to omit or insert an article common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention."

But what has been the practical construction of the term "claims," in such treaties? Aside from the decision under discussion, it seems to have been generally taken in its usual and comprehensive sense. Sir Edward Thornton, the Umpire of the Commission between the United States and Mexico, 1868, comprehending the adjustment of "all claims on the part of * * * citizens * * * *arising from injuries to their persons or property*," &c., &c., held March, 1876, that claims arising *ex contractu* did not come within the purview of the treaty; not because, however, they were not embraced within the meaning of the general term, but because they did not fall within the terms of its qualification. In other words, because they were not of the *character* of the claims therein contemplated. He said:

"In the case of Dewhust and Emerson *v.* Mexico, No. 673, the claim arises out of an alleged contract with the Mexican Government, through its agent, for the supply of munitions of war, some of which are stated to have been delivered to that Government. * * * The Umpire maintains his opinion that the acts complained of did not constitute *one of those injuries to the property* of U. S. citizens, which was contemplated by the Convention of July 4, 1868."

The present claim was dismissed by the former Commission as "being consolidated debt" (a mistake in fact, for it was *consolidable* debt only). But that Commission allowed the claim of R. W. Gibbs, founded upon a Colombian obligation for $5,000, the amount allowed being Venezuela's distributive share (28½ per cent.).

The convention of September 21, 1868, between Great Britain and Venezuela, entered into "with the view of determining the amount of *all pending British claims* upon the government of Venezuela," provided a tribunal with an umpire, "to sit as a Mixed Commission to fix the amount due to those British subjects whose claims have not yet been adjudicated upon."

That Commission, 1869, allowed by the decision of the umpire eleven claims on account of Venezuelan notes, common and preferred stock of the Bank of Venezuela, and Colombian bonds, amounting, including interest, to $139,104.04, to wit: To W. A. Cage, $3,879.42; Sarah Campbell, $4,005.01; Court & Borde, $6,058.87; L. Augustini, $2,150.16; W. A. Andrel, $7,199.87; H. O'Callaghan, $19,093.21; M. A. Elizando, $5,498.07; Robert Syers, $7,924.72; Bernardo Daly, $1,527.33; Arthur Halle, $70,795.06, and to J. A. S. Cipriani, $10,971.33.

Other instances could be supplied, but these being contemporaneous will suffice.

Although the opinion of either government respecting the interpretation and scope of the treaty would not bind us, still such opinion would be entitled to high respect and may be cited as any other authority. It would seem from the note of Mr. Scott, American Minister at Caracas, to Mr. Bayard, Secretary of State, under date of January 14, 1889, that the Venezuelan Government regarded the claim of Nathaniel Jarvis, pending here, alleged to be founded upon bonds issued in 1863 to him by said Government, as coming within the purview of the treaty, and as proper to be submitted to the Commission then about to be formed.

The Umpire proceeds:

"Were the Commission to adopt the contrary principle of interpretation it would be open to the charge of assuming powers, the exercise of which is always jealously reserved by governments to themselves."

So much of this argument as may not be said to fall under the head of *petitio principii* seems to proceed upon an untenable assumption. It does not follow that if jurisdiction is not to be declined because there may be a reasonable doubt of its existence, the "contrary principle" must be adopted, which would seem to be, to wit: To take jurisdiction unless its exclusion is required beyond a reasonable doubt. Why go to either extreme? Why not take the plain middle ground, ascertaining the meaning of the language employed according to the ordinary standards of interpretation? It is not apparent how a body passing upon a judicial question, any more than upon a mathematical one, can be concerned about what may be charged against it if led to this conclusion or to that. Were it otherwise, a charge of assumption of power is no more to be avoided perhaps than a complaint of failure to exercise power conferred, through apprehension of such charge.

The Umpire goes on:

"The time and manner prescribed for the presentation of claims, and the limited duration of the functions of the Commission, show, if further proof were necessary, that the powers delegated to it are of an exceptional and circumscribed character."

Very true. But this fact, it is believed, is no sufficient warrant for giving to terms employed in a treaty other than their ordinary meaning in like relation.

Says he in continuation:

"The term 'claim' must be construed so as to confine it to demands which have been made the subject of international controversy, or which are of such a nature as according to received international principles would entitle them on presentation to the official support of the Government of the complainant."

It occurs to add to what has already been said touching this proposition:

In discussing the scope of the word "claim" in the treaty

of 1819 between the United States and Spain, Mr. John Q. Adams, Secretary of State, in his letter to Messrs. White and others of March 9, 1822, observed that the treaty under the general term "claims"—

"Provided for the settlement of claims on contracts as well as claims on torts."

"The Government was indeed aware," he says, "that the abstract right to its interposition of citizens who had suffered by acts of foreigners, without any co-operation of their own, was more clear and imperative than that of others who had voluntarily staked their property on the good faith of Spain; and in the course of the negotiation a proposal was made to omit the renunciation which included the latter class of these claims. It was, however, finally agreed to, with the full understanding that all claims should have the same benefit of the provision."

"As there is no limitation in the words of this renunciation with regard to the nature of the transactions in which the claims originated, whether by contract or by tort, so none was intended. These were claims, of all of which it was believed that the only possible chance of obtaining *any* satisfaction to the claimants consisted in the execution of the treaty." (American State Papers, For. Rel., VI, 796).

It was not thought then, it would seem, that interpretation could discharge the office claimed for it in the opinion under consideration. Had it been, the "renunciation" referred to would have been implied, and its insertion superfluous. If the Umpire's doctrine be tenable, there is no difference in meaning between these two sentences in a claims treaty:

"All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, which may have been presented to their government or to its legation at Caracas before the first day of August, 1868, * * * shall be submitted to a New Commission."

"All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, *which have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them on presentation to the official support of the Government of the complainant, and* which may have been presented to their Government or to its legation at Caracas, before the first day of August, 1868, * * * shall be submitted to a New Commission."

It would be a bold declaration to assert their substantial sameness.

Had it been the intention thus to limit the claims in *character*, it is difficult to understand why language to that end was not used as had been done before, as seen, and by the same parties, in conventions with other powers.

The Umpire says further:

"The claims for payment of the bonds are not, in my opinion, of such a character. The Government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen who holds an interest in the public debt of a foreign country, and who, in common with the other shareholders in that debt, is unable to obtain payment of what is due him, is entitled as of right to the same support in recovering it as he would be in case where he had suffered from a direct act of injustice or violence."

Very true; bonds are not of the character of claims ordinarily diplomatically pressed by one government against another. But since the celebrated circular of Lord Palmerston, in 1848, to British representatives at foreign courts, it would appear to be the established English doctrine at least that a State has *the right* authoritatatively to interpose, in behalf of its subjects or citizens, in support and enforcement of claims founded on bonds, against other States, if it chooses to do so. (Phillimore, Int. L., Vol. 2, 8; Hall, Int. L., 236–7.) And both the United States and Great Britain, as also other powers, have repeatedly, through treaties and other agencies, secured money due their citizens on contractual obligations from other States. And why not?

Hall, with much reason, says:

"Fundamentally, however, there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the State, as itself the wrong-doer, is immediately responsible. The difference which is made in practice is in no sense obligatory, and it is open to the Governments to consider each case by itself, and to act as seems well to them on the merits."

The Umpire goes on:

"The Government reserves to itself on special grounds the right to determine when and under what conditions such support shall be given, and this Commission cannot assume, upon the strength of a general term, and in the

absence of express language to that effect, that the Government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy."

The strength of language does not consist in multiplicity of words. The "strength of a general term" may be quite as effective as that of many terms. Where, in words, "*all* claims" are submitted, there cannot be said to be an "absence of express language" of submission, nor room for assumption in that regard.

While the United States, under its settled practice hitherto, would not diplomatically urge the payment of bonds to its citizens upon another State, it by no means follows, either from principle or precedent, that it would not treat for their settlement along with other claims or even alone. And to put a narrow construction upon language, in a general claims treaty, so as to exclude bonds upon the grounds suggested, would seem to have no better warrant than narrowly to construe conventional language conferring other benefits, to attain which a State would decline diplomatic interference or a resort to force.

He says further:

"It does not appear to me that the correspondence quoted with the United States Legation at Bogota is sufficient to constitute such an official support on the part of the United States Government to these claims as the circumstances of these cases would require to give them a '*locus standi*' before the Commission. It is of a private and at most of an officious character, and does not transcend the limits of that friendly countenance and aid which the minister of foreign powers always gives to the holders of shares in public debts. No evidence has been adduced of instruction having been given by the State Department to press for the satisfaction of these particular claims, and indeed it is easy to see that many reasons of policy may exist which would deter a government from insisting on a preferential payment of a part only of the public creditors of a foreign debt."

Is it the thought here that, had the Secretary of State been more urgent in the tone and character of his dispatches to the American Minister about the bonds, the words of the treaty would or might have borne a different interpretation, and the bonds been accorded a *locus standi* before the Commission?

It may be that reasons of policy may on occasion deter a State from insisting on preferential payments of bonds to its citizens or subjects as stated; and such also may *not* at times be the case, as evidenced under the English-Venezuelan treaty of September 21, 1868, above referred to. The only way to ascertain whether such be the fact in any given case of conventional compact in the presence of that character of indebtedness, would seem to be from the language of the instrument itself, applying to it the ordinary meaning of the terms employed.

And it may be remarked that, in the task of interpretation, a commission like this, it is believed, has little to do with policies outside of the revelations of the instrument under consideration, especially as these with respect to either Government concerned are liable to change, and as between the two are often variant.

"What is termed the policy of the Government with reference to any particular legislation," said Mr. Justice Field in Hadden *v.* Collector, 5 Wallace, 111, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground which is too unstable upon which to rest the judgment of the court in the interpretation of statutes."

In the English case of St. Gregory, cited in Potter's Dwarris, 214, Taunton, J., said:

"The judgment was arrested by Mr. Justice Baily, partly on the consideration of public policy; a very questionable and unsatisfactory ground, because men's minds differ much on the nature and extent of public policy."

And Williams, J., added:

"The ground of public policy is a very unsafe one; it is best to adhere to the words used in the act of parliament."*

Were the question propounded, What has been the *policy* of the United States or Great Britain, if either can be said to have any, with respect to providing in claims treaties for

* Building Society *v.* Kent, L. R. 9, App. Cases, 273; Hadden *v.* Taylor, 42 N. Y., 259; R. *v.* Barbour, 8 B. & C., 99; Atty.-Gen'l *v.* Lockwood, 9 M. & W., 395; R.R. Co. *v.* Pittsburgh, 104 Penn. St., 543.

the discharge of contractual obligations towards her citizens, the answers would likely be materially different.

The controlling "policy" with us, as respects interpretation, is the to-be-assumed one that nations in their treaties with each other, say what they mean and mean what they say.

"The only sound principle," says Story, "is to declare *ita lex scripta est*, to follow and to obey; nor if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience. Men on such subjects complexionally differ from each other. The same men differ from themselves at different times The policy of one age will ill-suit the wishes or policy of another." (Story on Const., § 436.)

It is to be borne in mind that the question is not what Venezuela might do in respect of the payment or disposition of her public debt or other contractual individual obligations, in her capacity as sovereign, or what the United States might do under an established policy in the absence of treaty compact, respecting the claims of her citizens holding any of such obligations. The sole question is, whether, *as determined by the language of the treaty*, fairly and according to recognized canons of construction and interpretation considered, the high contracting parties did in fact submit this claim to the Commission.

From any and all points of view, therefore—whether it be that of the ordinary (which is the treaty) import of the terms; that of their legal signification and use; that of usage in framing claims treaties, or of actual practice under them—we are led to a different conclusion from the Umpire. To refuse jurisdiction here would, in our opinion, be in effect to interpolate a most material clause in the treaty. In fact, to attempt "interpretation" of the plain words "*all* claims" at all, in the connection employed, we should have felt, but for the opinion under review from so able a publicist, would be violative of Vattel's first rule, above quoted. We should have said what seems even yet to us true, to wit: They need no interpretation.

In coming to this conclusion we have not been unmindful that too close adherence to mere words or too rigid an application of formulated rules is to be as much guarded against as too great a laxity in these respects.

This claim was placed with the American legation at Caracas as early as February 22, 1855. It was presented to the Government at Washington August 15, 1857, and on December 22 following, the Secretary of State, Mr. Cass, directed the American Minister at Caracas to bring it to the attention of the Venezuelan Government and to exercise "good offices" in that behalf. Before that it was urged upon the attention of the latter Government by Mr. Henry S. Sanford, as agent of the claimants. It was presented to the former Commission in 1868, through the United States legation at Caracas. So that it not only comes within the literal terms of the treaty as to presentation, but it was thoroughly known to each Government when the present convention was framed as a pending claim. There is no question, from the showing here, that, in their origin, these bonds pertained to citizens of the United States. What the consideration of the 406 Colombian bonds was appears inferentially. The great bulk of the 5 per cent. Colombian domestic debt of which they formed a part, had as its basis indebtedness for military and other supplies. In their letter to the Secretary of State, August 15, 1857, the claimants speak of this class of obligations as "founded upon considerations of the highest character." It seems quite probable, as claimed in the oral argument, that the Colombian bonds were issued to the New York firm in payment for merchandise, though at what rate does not appear. This claim comes within the treaty.

The allowance of the claim is resisted upon this ground, stated in the language of the learned counsel for Venezuela:

"The defence set up by Venezuela in this case is, that the Bills of Credit upon which suit has been brought, being a portion of what in 1839 and ever

since has been known as 'The Consolidable Debt of Venezuela,' have never been directly payable in money; that the only method of satisfying them at any time, as was known to those whom the claimants represent when the bills were applied for and received, was by their conversion into the *Consolidated* debt of Venezuela, the latter afterwards to be satisfied in money; and that the method of converting such bills into that Consolidated debt was *by auction*, in which a limited amount of the latter was exposed to be bought by the holders of the former, of which comparatively very large amounts were outstanding; the subsequent method of obtaining *money* for the Consolidated debt being also a like *auction*, where the debt offered would in turn be out of all proportion larger than the amount of money to be bid for."

The debt of Colombia was divided into two general classes, the Foreign and the Home debt. The former amounted to near 30 million dollars, bore 6 per cent. interest, and its payment was specially provided for. The latter, made up itself of several classes, aggregated some 26 millions, and carried two rates of interest. A part bore 5 per cent., a part 3 per cent., and a part was non-interest-bearing.

Colombian bonds were issued on account of the interest-bearing portions of the home debt under an act of May 22, 1826, which constituted what was called The National Consolidated Colombian Debt.

To the payment of the interest thereon, some fourteen distinct sources of revenue were specifically dedicated by said act. There was also special provision made therein for the redemption of the principal.

The exchanged bonds of the Howlands were a part of this 5 per cent. consolidated Colombian debt.

At the partition of the Colombian debt among the constituent States of the old Republic under the treaty between Venezuela and New Granada of 1834, 28½ per cent. thereof fell to Venezuela, and in her portion were these 406 Howland bonds received by them before the dissolution.

That part of the treaty bearing particularly upon this subject, reads as follows:

"ART. 10. The consolidated debt at five per cent. annual interest, which is inscribed in the great book of the national debt of Colombia, amounting to 5,374,905.75 pesos, which, by the sinking fund made up to December 31,

1829, remains reduced to 5,359,355.75 pesos, is divided in the following manner :

"The Republic of Venezuela binds itself to recognize the sum of 1,527,416.37½ pesos.

"The Republic of New Granada binds itself to recognize the sum of 2,679,627.87½ pesos.

"And the Republic of Ecuador will recognize the sum of 1,152,261.50 pesos.

* * * * * * *

"ART. 12. The Governments of the three Republics, after the exchange of ratifications of the present convention, will proceed to the conversion of the National Consolidated Colombian debt into a debt belonging to each one of them for the amounts which respectively pertain to them, calling in and cancelling the Colombian bonds conformably to the regulations which may be laid down by the respective legislatures : these so called in and cancelled will be transmitted to the Commission of Ministers of the three Republics, which shall meet in the city of Bogota for their verification and destruction."

Accordingly, in her law of April 26, 1838, sec. 7, Venezuela provided :

"For the conversion of the debt of Colombia into the debt of Venezuela, treasury bills of credit payable to bearer will be issued from fifty up to one thousand pesos, in accordance with the request of the creditors."

Like the old Republic she made special provision for the foreign or European debt falling to her ; and likewise set apart several—some four or five—distinct sources of revenue for payment, interest and principal, of the three and the five per cent. Colombian domestic debt.

In addition to these resources, this Colombian debt with the Venezuelan bonds or bills issued on account thereof, was made convertible into the Consolidated Debt of Venezuela, so called. This consolidated debt was a sort of irreducible sinking fund fixed at 500,000 *pesos*, on account of which 5 per cent. bonds were issued in exchange, according to a prescribed method, for said convertible or consolidable securities, and for the yearly payment of the interest on which and the reduction of the principal, 50,000 *pesos* were permanently appropriated from the customs revenue. After payment of interest on the consolidated bonds the balance of the 50,000 was devoted to the reduction of the principal

of the consolidated debt, those holders being paid who would bid at "auction" the largest amount of them for a given sum (100 *pesos*) of money, not less than dollar for dollar. The sinking fund was then reimbursed from consolidable securities in the same way; that is, the holder of consolidable bonds who would give most of them for a given amount of the consolidated would obtain it.

The 16th article of the act provided:

"*The holders of evidences of the debt of Colombia who shall not convert them in conformity with this decree shall preserve the rights which they have acquired in respect to the manner and terms of payment; but those who request and obtain the conversion will have no other rights than those which this law confirms in articles* 4 *and* 10."

Articles 4 and 10 referred to are the ones providing for the payment of interest on and the reduction and replenishment of the consolidated debt or sinking fund, as stated.

The act of May 10, 1839, followed. It provided:

"ART. 1. In order that the total amount of the Colombian debt may be determined without delay, and in pursuance of the arrangements made by the convention of December 23, 1834, in relation to the division of the said debt, and of the subsequent agreements made by the commission of ministers which met at Bogota, the Executive Power is authorized to proceed to convert into Venezuela's own debt the proportion which falls to this Republic conformably to Article 1 of the said convention.

"ART. 2. The debt converted into Venezuela's own debt shall be represented by notes (bonds) authorized by the commission of public credit, in accordance with such forms as shall be established by the Executive Power, with all proper precautions against counterfeiting, and shall bear the name of *Consolidable Debt of Venezuela.* (*Deuda Consolidable de Venezuela.*)

"ART. 3. *From the date of the issue of the notes (bonds) referred to in the preceding article, no others shall be admitted to the conversion of consolidable debt of Venezuela*, to which the law of April 26, 1838, relative to the public debt, refers."

In this state of the law, the Howlands converted their Colombian bonds, 1839, into "Venezuela's own debt" and obtained the bills in controversy.

Before this last act they, it would seem, preferred their Colombian bonds which were a charge against New Granada and Ecuador as well as Venezuela, to the Consolidated

"treasury bills" of the latter authorized by previous legislation. But now, the pledge being added that the consolidable securities should be confined to the Colombian domestic debt falling to Venezuela, the extent of which was known, their own holding constituting a good part thereof, they made the change.

There was subsequent legislation on the subject, radically changing the law of this period, which need not be traced particularly. The principle, however, of maintaining the consolidated debt as a sinking fund, in one form or another, was kept up with interruptions.

Three changes in the law will be generally noted:

1. The price at which the consolidable bonds could be exchanged for the consolidated was soon arbitrarily fixed. At first, three of the former were required to be surrendered for one of the latter; and at last, 1865, five for one.

2. New loans and other forms of indebtedness to a large amount, in excess of the original Colombian conversion, were added to the consolidable debt of Venezuela and thus made convertible into the consolidated debt, and they were made exchangeable on better terms than the consolidable bills of 1839—a part being convertible *peso* for *peso*. The interest and redemption fund annually appropriated was not, after 1852, kept at ten per cent. of the sinking fund.

The option of the holder of these (1839) consolidable securities to convert or not as he chose into consolidated debt, under the law of 1838 quoted, and re-enacted in 1843, was finally taken away in 1865, when he was required to convert at 20 cents on the dollar. By executive decree, July 1, 1865, it was provided:

"The Republic will not recognize as its debt any bills, securities to bearer, or evidences of any kind whatsoever unless the same shall have been presented on or before the date fixed" [which was December 31, 1865, as to this class of debt] "nor shall any bills, securities to bearer, or other evidences of indebtedness be converted into Consolidated Debt which are presented for conversion after the date designated by the preceding article."

This time was subsequently extended to April 30, 1866.

The owners of these 366 bonds never exercised the option or yielded to the requirement of conversion. The securities stand as they did on the day of their issue save the official indorsement of their genuineness made in pursuance of law in 1859.

The question is, under this state of fact, What are the rights of the parties?

Under the Constitution of 1830 (Title 14, § 14), the Venezuelan Congress had power "to contract debts on the credit of the State," and such was its duty in respect of the Colombian indebtness assigned to Venezuela under the treaty of 1834. There is no question, therefore, as to the validity of the legislation under which these bonds were issued, as there is none as to their *bona fides*. There is no doubt either that this legislation entered into and formed a part of the contract with the takers of the securities as fully as if engraved on the bills and in terms made a part thereof. But the contract was mutual. In justice it bound the Government as well as the bill-holder. Holders were given the right to exchange their bills into consolidated debt at the market value, and thus put themselves in the line of certain, regular interest payment and the ultimate discharge of the principal. It could be exercised at any time "at the will of the holders," "while the classes of international debt existed," of which these bills were a part. This was the contract.

The act of 1838 and that of 1839 being on the same subject are to be taken together as constituting one law, in so far as they are consistent with each other. The latter may be regarded as an amendment of or addition to the former, and, at points of variance, it will, of course, prevail. Article 16, above quoted, not being inconsistent with the later act, was in force when the Howlands obtained their securities, and was, as it were, impressed on them.

It provides two things: 1st. Holders of Colombian securities "who shall not convert them in conformity with this de-

cree, shall preserve the rights which they have acquired in respect to the manner and terms of payment." 2d. "Those who request and obtain the conversion will have no other rights than those which this law confirms in articles 4 and 10."

There are two "conversions" contemplated by "this law," to wit: Conversion of "consolidated or consolidable debt of Colombia into consolidated debt of Venezuela," and "conversion of the debt of Colombia into the debt of Venezuela."

While the Howlands may not possibly have literally made their exchange "in conformity with *this decree*," yet they did so in substantial conformity thereto, although under the act of 1839. And taking the term in its wider sense, they, in making their "conversion," voluntarily shut themselves up to the sinking fund or "auction" mode of payment. And such would seem from the letter of their agent, Mr. John M. Foster, to the American Minister at Caracas in 1855, to have been their actual understanding. For the complaint then was not of non-payment, but of failure on the part of Venezuelan Government to carry out in good faith the sinking fund law. Had that been done—had the law, as it stood in 1839, been fairly administered—the claimants would have no right to look to other source of payment. But the difficulty is that was not done. The contract was not fulfilled by Venezuela. The law was greatly modified to their prejudice and in violation of the understanding embodied in the legislation of 1838–'9, under which they acted. When the means of payment to which they had agreed to look was thus taken away or materially impaired, what in justice became their rights? They had exchanged their Colombian bills for these bonds redeemable according to a prescribed method on the faith that such method would be faithfully regarded and carried out.

It seems to us there can be but one answer to this question, namely: At the impairment, the debt as it then was

became due and payable. The Government having disregarded and put out of the question the execution of the contract as to the terms and manner of payment, the holders became thereby absolved from it.

Would any one for a moment say that when by the contract the Howlands were given the right at will to exchange their bills into consolidated debt at the best rate the market would allow, it was not an impairment of that right arbitrarily to fix a less advantageous price at which the exchange should be made? Could it be claimed that when the law of 1839, forming a part of the contract, provided that no other notes or bonds than the Colombian indebtedness therein referred to "shall be admitted to the conversion of consolidable debt of Venezuela," the admission thereto of large amounts of other bonds and subsequently accruing debts of the Republic, and on greatly better terms of exchange at that, was not an impairment of this source of payment?

Was it not violative of their rights, in respect of payment, to take away from them the option aforesaid, given in the original legislation, and compel them to invest in the consolidated debt at five bonds for one, at the penalty of forfeiting their whole claim?

These questions answer themselves. Debts cannot be paid by acts of Congress. This is not a case of bankruptcy. There is no difference in principle between discharging a part of a debt by legislative decree and wiping out the whole of it by the same means, as there is none between paring off and diminishing the value of an obligation by degrees, in one way and another, until that value is destroyed, and out-and-out destruction at once. If there be any difference it is in favor of the latter, as a quick death is preferable to torture.

Under the scheme provided in the legislation of 1838–'39 it would seem this class of securities advanced in value until 1852, when the consolidable debt was reduced to some 300,000 *pesos*, two-thirds of which face value the Howlands

held. Had the laws not been altered, to the prejudice of the holders, it appears not unlikely that those who deferred the exercise of their option, as did the Howlands, would have in due time and long ere this seen their securities reach par, they having gradually gone up from 1839, as the evidence discloses, under the then faithful administration of the law, reaching 50 in 1852.

The Howlands are the original takers of the bills in controversy. Were not such their situation, their rights under the treaty might be different. Had they bought the bills in the market they might occupy no more favorable position here than would the seller.

Under such circumstances what does justice require at our hands?

There seems but one answer: allowance of the claim.

On the question of interest a majority of the Commission, under the discretion given by the convention in that regard, are of opinion that substantial justice will be done if allowance be made from the date of the very material impairment of their rights by Venezuela by the increase of the consolidable debt in 1853, the original claimants having in 1855 expressed themselves as satisfied with the administration of the sinking fund before that date.

The entry may, therefore, be for the face of the bills with 5 per cent. interest from April 26, 1853, to September 2, 1890, inclusive, counting the *peso* at 75 cents gold coin of the United States.

FINDLAY, on Jurisdiction:

It is the law of the United States and the respective States composing that Union that neither the sovereignty of the federation nor of any of its constituent parts can be brought into court at the suit of a private individual without its consent, and in giving this consent the sovereignty is at liberty to prescribe the conditions under which the suit shall be instituted and conducted. It is also the law of the United States that the sovereign of another country cannot be sued in its courts by its citizens nor subjected to judicial process by attachment or other proceeding to enforce an appearance. This law was laid down by the Supreme Court in the leading case of Cohens *v.* Virginia, in 6 W., p. 264, and has been repeated and reaffirmed since in a multitude of decisions both State and national.

Joseph D. Beers, &c., *v.* State of Arkansas, and notes (L. C. P. Co. Book 15, p. 991.)

It has been carried so far indeed that no judgment can be rendered against the United States for balance found due a defendant in set off.

Reeside *v.* Walker, 11 H., 272.

This principle of immunity from suit applies to every sovereign power without regard to the form of the government, as it is held to be essential to the common defence and general welfare, as without its protection government would be disabled from performing the various duties for which it was created. As before observed it applies to suits against foreign sovereigns and prohibits the seizure of property within the domestic jurisdiction, for the purpose of facilitating such procedures.

Vavasour *v.* Crupp, 9 Ch. Div.,351.

The Parlimente Belge, 5 Prob. Div., 197.

The Exchange *v.* McFaddon, 7 Cr., 116.

U. S. *v.* Lee, 106 U. S., 196.

It is believed there is no exception to this rule, which is manifestly founded in the very conception of a sovereign power, but the voluntary departures from its enforcement are numerous; and most, if not all, civilized States recognize the necessity for establishing some judicial means by which errors in administration may be corrected, and wrongs remedied of which the State has been the cause and the citizen the victim. Hence, courts of claims of one kind or another, some with a limited and others with a more enlarged jurisdiction, have been established in which the individual may seek redress against the sovereign, and obtain relief by the same methods as practised in the ordinary tribunals of justice. The great question that confronts us on the threshold of this case is: Whether by the use of the terms under which this Commission has been created it was the intention of the United States to demand and Venezuela to assent to a submission of a portion of her public debt to the decision of this body as one of the claims agreed to be referred within the clear intent and purview of the treaty? It will be observed, by the express language of the treaty, that *all claims*, without limitation or qualification, are within the terms of the submission, the only proviso being, that they shall be claims of citizens of the United States against the Government of Venezuela, and that they shall have been presented in the mode and by the time prescribed. Giving full and unrestrained effect to this sweeping provision, it would be impossible to exclude any claim of any kind, whether affecting the public debt or not, provided the claim, both in origin and presentation, had the required national status.

This limitation, however, it will be observed, would necessarily confine the allowance of such a claim to persons who were citizens of the United States when the obligations were incurred, or who now hold them in virtue of representation of such persons; and in consequence, the danger of letting in by assignment or transfer the bulk of the outstanding debt would be avoided. There is not much aid then by way

of construction to be derived from the general and comprehensive character of the terms used as suggestive in themselves of some implied or latent restriction; for while the terms are broad enough to include claims of every kind, the right to enforce them is confined to the only class of persons intended to be benefited, to wit, citizens of the United States. It is to be observed, too, that this claim was presented to the Old Commission and dismissed because it represented "Consolidated Debt," but the integrity of the claim was in nowise to be affected or invalidated by such action. (See Journal of Proceedings, p. 114.)

The joint resolution of 1883 which provided for a reopening of the old claims and the creation of a New Commission was passed, as its recitals show, not at the instance of Venezuela only, but of citizens of the United States also who felt themselves aggrieved by the action of the Old Commission in dismissing or refusing to entertain their claims. Indeed the evidence shows that the most active promoter of the legislation necessary for a rehearing was the gentleman who has argued this case in part for the claimants, and who appears to have been the draftsman of the joint resolution in which this convention originated. There were, in fact, two active, powerful, and co-operating interests at work in accomplishing this result. On the one side was Venezuela complaining that the former awards were tainted with fraud and should be set aside, and on the other were citizens of the United States alleging that in the eagerness to pass certain claims the Old Commission forgot or overlooked its duty towards others equally, perhaps more, meritorious; and as the result of the joint pressure of these representations, Congress was finally induced to adopt the resolution referred to.

These facts, of course, were well known to both the United States and Venezuela, when the convention of 1885 was negotiated, and in view of these facts, that is, that this claim had been presented to the Old Commission and rejected, and that this rejection, was among other causes which led to the

creation of the New Commission, are we justified, notwithstanding the magnitude of the claim and its somewhat novel character, in saying that it was not the intention to include it within the terms of a submission which refers *all claims* without any reservation or limitation whatever?

If such is the conclusion it can only be because the case itself does not show a claim within the meaning of that term, and this we will examine for a moment. The case rests upon the presentation of 366 of the bonds or due bills of Venezuela, which were given in exchange for 406 of Colombian bonds.

They are all dated the 15th of September, 1839, at Caracas, and bear five per cent. interest per annum from the 1st of January, 1827, and are acknowledged in favor of the bearer, but state no date when they shall become due and payable.

Each one is for the sum of 500 pesos, and their genuineness has been proved and is conceded. It is also a concession that no part of the indebtedness represented by these bills, either principal or interest, has ever been paid.

It is contended, however, by the learned counsel for Venezuela in a printed brief recently filed, that there was in fact no obligation to pay them in money; that they were in the nature of scrip with the privilege of being converted or funded into a debt called the consolidated debt, and that until this was done they were simply consolidable, and that the claimants by inaction in availing themselves of the option to convert have not only lost it, but Venezuela has become acquit and released from any obligation for the debt itself.

On the other hand, the claimants contend that if they did not avail themselves of the option, but chose to hold the original evidences of this debt, submitting in some way not explained to a discount of $20,000 on the exchange of Colombian for Venezuelan bills, under a law which at the time of the exchange preserved whatever rights they had as holders of said bills, until the conversion was made, then it matters not

what course Venezuela pursued subsequently with reference to her public debt, as any refusal to pay or provide for the satisfaction of these bills taken on the faith of existing law would be flat repudiation. Between these contentions the radical point of departure seems to be whether the alleged option was an option or not. If it was an option as generally understood, and a time had been prescribed within which it must be exercised or held to be forfeited, nothing but the right to convert, and whatever benefits the conversion would bring with it, could have been lost. Upon what principle the failure to exercise the option would destroy the obligation of the debt itself, or how that obligation is to be discharged except by payment, compromise, or satisfaction of some kind, is more than we can perceive. Waiving this discussion, however, for the moment, and reverting to the original question, Would it not be difficult, on any interpretation, legal or conventional, to hold that a controversy with these radical elements of difference did not constitute a claim? As originally argued at bar the contention of Venezuela was that the claimants had not presented their bills in twelve years, and therefore, for that period must suffer a loss of interest; but the integrity of the debt itself was not questioned. The ground has been since shifted and the question waived whether there is any debt.

On the concession that there was an actual subsisting debt of a definite amount, represented by certain positive obligations, the genuineness of which was admitted, one party to the controversy would be retired, and the litigious character of the claim destroyed. The claimant then would have simply occupied the position of one who was asking payment of a claim which his debtor did not dispute, and some question might have been raised as to whether there was not involved in the very idea of claims, as submitted for our decision, the elements of controversy and resistance. But Venezuela now not only does not admit the existence of the obligation to pay, but insists that the *vinculum juris* between

her and her creditor has been destroyed; that there is no debt in fact, and that her acknowledgment of such, in 1839, has been subsequently defeated by the exercise of the same sovereign will by which it was originally declared.

If this contention, along with the vigorous denial of the claimants, does not constitute a claim, and a disputed claim at that, I am at a loss to understand the meaning of language, and shall not travel out of my way in search of precedents or illustrations to show that such must be its significance. As a claim, then, how shall we, bound by a solemn declaration to do impartial justice, escape the responsibility of passing upon it, whatever may be the amount or other issues of grave importance involved? We are aware, of course, that it is not the policy of the United States to exert diplomatic intervention in behalf of claims purely contractual in their character, and that the eminent men who have filled the Department of State from an early period have contended that such engagements being voluntary, should be settled between the parties without the interference of the Government. And so, if we were representing or speaking simply for the policy of the United States, as expounded by its Secretaries of Foreign Affairs, we would be compelled to dismiss this petition, and send the parties to Caracas. But we are sitting here under treaty between the two countries; the plain, the sole object of which is to have heard and determined all claims, contractual or otherwise, which the citizens of one country have against the Government of the other. If it be said that the policy of the United States should be imported into the treaty for the purpose of modifying express terms too general in their character, and cutting down the claims to such as that country would make the subject of a diplomatic representation, then the plain answer is, that all the claims of that nature would be excluded from our jurisdiction, and the object of the treaty as expressly declared, which is to dispose of all claims, would be defeated. It was just because the policy of the United States in this

respect did not permit it to urge claims of this kind outside of the mild and inoffensive range of personal and unofficial good offices, that the greater necessity existed to provide for their settlement by convention. And besides, as before shown, after the submission of this claim to the Old Commission, and the steps that were taken to open its work, and have a new adjudication, it would strain probability beyond endurance to suppose that this matter was not discussed by the plenipotentiaries of the respective powers, and that the whole matter under the comprehensive word "claims" was referred for settlement to this Commission. If the plenipotentiary appearing for Venezuela desired that the jurisdiction of the Commission should be confined to certain classes of claims and that others should be excluded, it is probable that he made his desires known, and that the most he could accomplish with the representative of the United States, was in getting him to agree that all claims should go to the Commission, and that that body should determine for itself the limits of its jurisdiction. At all events that is the form in which jurisdiction is vested in us, and unless we deliberately shirk the discharge of a plain duty, we see no way of escape from the conclusion that this claim is one which we are bound to hear and consider. In this connection, too, it is well to state what has been so forcibly presented by other counsel for the claimants, that the history of previous international arbitrations between the United States and certain of the South American republics and Mexico demonstrates that this class of reclamations was acknowledged and recognized in repeated instances by commissions organized under treaties containing the same general words of submission with which we are now dealing. For example, by the treaty of 1857, between the United States and New Granada "all claims" were referred to a commission and an award was made in favor of Robert W. Gibbs on a claim founded upon a certificate that a certain sum of money was due by the

Colombian Government, the same certificate in fact on which this Commission has also made an award in favor of the same party for the percentage of the claim to be paid by Venezuela.

By the treaty of 1863, between the United States and Peru, "all claims" were submitted to a commission, and an award was made in favor of a party on a bill of exchange made by Peru. On November 15, 1869, a treaty was made for the settlement of "all pending claims" of British subjects against Venezuela, and it appears that several awards were made for the 28½ per cent. of the indebtedness of Colombia awarded by Venezuela. It is true that Sir Frederick W. A. Bruce, as the umpire of a second commission, under a treaty between the United States and New Granada, held that it was not reasonable to suppose that claims of this kind were intended to be submitted, notwithstanding they were included in the express terms of the submission.

His argument is based upon the proposition that the term "claims" must be

"construed so as to confine it to the demands which have been made the subject of international controversy, or which are of such a nature as, according to received international principles, would entitle them, on presentation, to the official support of the Government of the complainant."

The learned jurist then proceeds to state:

"That the Government of the United States, like that of Great Britain, has not laid down or acted upon the principle that a citizen who holds an interest in the public debt of a foreign country, and who in common with the other shareholders in that debt is unable to obtain payment of what is due to him, is entitled as of right to the same support in recovering it as he would be in a case where he had suffered from a distinct act of injustice or violence. The Government reserves to itself, upon special grounds, the right to determine under what conditions such support shall be given, and this commission cannot assume upon the strength of a general term, and in the absence of express language to that effect: that the Government of the United States intended to delegate to it powers which it has not exercised itself in a matter of so much delicacy."

It will be admitted, as it has already been, that the policy of the United States with reference to the enforcement

of claims purely contractual is correctly stated; but it may be a matter of question whether in view of Lord Palmerston's famous circular the view of Great Britain upon the same subject has not been put a little too broadly. (See also Hall Int. Law, p. 257.)

But concede that there is no error in the statement with respect to either country, when enforcing its foreign policy through the ordinary diplomatic channels, we can perceive no reason why such a policy should not be departed from, when arbitration is adopted as the method of finally adjudicating international claims. A claim is none the less a claim because it originates in contract instead of tort. The refusal to pay an honest claim is no less a wrong because it happens to arise from an obligation to pay money instead of originating in violence offered to person or property. Torts as a rule present more aggravated cases of injustice and affect the citizen at points which more loudly call for redress than ordinary breaches of contract; but after all the difference lies in degree only.

This difference, however, has been sufficient to check, as a rule, official demands for reclamation in the case of contracts with the *ultima ratio* of reprisals and possible war projecting its ugly shadow over the negotiation. But when two countries, by mutual agreement, have referred the causes of reclamation, of the citizens of one against the Government of the other, without distinction as to the origin or nature of the claims, it does not strike us that the policy of either country, with reference to such claims, as illustrated by the history of diplomatic intervention, is at all valuable for the purpose of explaining, what, indeed, according to our view, does not stand in need of interpretation.

On the contrary, if we were to call in inference to aid us in the interpretation of an ordinary term, which explains itself, we should say that the very fact that a Government felt itself constrained to deny to its citizens effectual interposition in such cases, would afford strong ground for

supposing that it purposed to accomplish this end by the peaceable method of arbitration. We know of no country which has ever held that it was no part of its duty to its citizens to provide for redress, in cases of contract, although the doctrine has been held by the United States that it would not officially intervene by diplomatic representation, with a purpose of accepting the final responsibility for such a course. Nor do we understand this to be the position of the learned gentleman whose opinion we are now considering. He surely would not contend that a Government owed no duty to its citizens in such cases, provided the debtor country itself opened up the way to a settlement. His contention is, that nothing short of express terms descriptive of this class of claims, *eo nomine*, will vest the jurisdiction to determine them, and giving the treaty a reasonable and not a merely literal interpretation, they cannot be considered as included by the general term used. But if we have the right to say that one class of claims shall be excluded, why not another? A Government due bill is but a promise to pay. A contract to build a breakwater between a Government and the citizens of another country is a promise to pay money on the fulfilment of the contract.

We have just decided, all the Commissioners concurring, that the Commission has jurisdiction in the breakwater case, and we have made an award against Venezuela for the money remaining due on the contract. Upon what principle could we justify the taking jurisdiction in the one case and decline it in the other? Both it will be observed are contractual in their nature, and neither would have received the aid of the United States diplomatically exerted, except in the form of good offices. The United States would have been as much bound by this policy to refuse its aid in the Walter claim for a breach of contract in not paying money due for a breakwater, as in the present case for the due bill. If this policy then is to be imported into the treaty for the purpose of excepting out of it matter which falls directly within its

express terms, upon what principle shall we determine what class of contractual claims was intended to be included? We do not understand that the United States has refrained from pressing a claim of this kind because it was founded on the public debt of another country, but because the claim itself was a voluntary engagement which the respective parties had better settle among themselves. This principle it applied to claims of this kind of every character, big or little, concerning public debt or otherwise.

Importing it into the treaty as a rule of interpretation with the effect of overruling the express terms of the instrument, it is obvious that the class of claims which this Commission is empowered to determine, would be limited to torts. But that is the very class which Governments have always held themselves bound to redress through the ordinary diplomatic channels. While, of course, they are included within the terms of the submission, it would be strange indeed if the other class, not subject to redress in this way, should have been excluded.

On the whole, without protracting this discussion further, we have come to the directly opposite conclusion from that reached by Sir Frederick, and hold that nothing short of words of express exclusion at least in a treaty negotiated under the circumstances of this one, could restrain and limit the meaning of the plain language used.

Claim of

JACOB IDLER
v.
THE UNITED STATES OF VENEZUELA. } *No.* 2.

[Dissenting Opinion—Filed August 6, 1890.]

ANDRADE:

In two essential points I regret to dissent from the opinion of my learned colleagues: (1) in regard to their conception of the character of this court and their mode of understanding and applying, in relation thereto, the principle of the validity and authority of foreign judgments; and (2) with respect to their views of the responsibility of Venezuela in consequence of the liquidation, which was the primary cause of this claim.

1. As to the first point, it will suffice to read the passages in Vattel and Wheaton cited in support of their opinion, and the reflections preceding these, to perceive that my colleagues treat this Commission as a domestic court of the United States, or of England, and as if the two Venezuelan judgments appearing as evidence in this case were foreign judgments. According to my apprehension, the Commission *is what it is* (*id quod est*), an international court of arbitration, of the United States of America and the United States of Venezuela! There would be little propriety in saying that before such a court Venezuelan judgments are foreign judgments.

There is a substantial difference between a domestic court instituted by a sovereign for the purpose of distributing justice within his territorial jurisdiction, and a court of arbitration especially instituted by two sovereigns for the settlement of certain matters in dispute between them. The one springs from domestic power, and has exclusive right of

jurisdiction within its own territory; the other springs out of the autonomy and free will of both contracting parties, and its jurisdiction may be said to extend to the territory of both. The former in adjudging performs an act of national jurisdiction; the latter, an act of international jurisdiction. The municipal court of a State cannot but consider as *foreign* the judgments of the municipal courts of another State, and in virtue of the principle of national independence has the right to subject the recognition of their validity and authority to rules more or less restrictive. To a court of arbitration created by two States, judgments of one of them cannot be *foreign*, and the confidence voluntarily put by both in its impartiality and prudence, should bind it to apply openly and frankly to the judgments of both, the general principle of the law of nations,—*res judicata pro veritate accipitur.*

Moreover, here two judgments are treated of, both rendered by Venezuelan courts, one in support of the claim, the other denying it. My colleagues have applied to the first the principle of the law of nations adverted to, and to the second the doctrine of the exclusive national jurisdiction; thus establishing a distinction, which has not seemed to me perfectly conformable to justice, as I understand it. Justice would put both judgments upon the same footing. In regard to the former, the government of Venezuela had contended that the court which rendered it had not jurisdiction over the cause. If then preference, perhaps undue, were to be given to *municipal* doctrines, and the course of *revision* were to be adopted, the power which that court professed to have of taking jurisdiction ought also to be looked into; because if it had not that power, its judgment was a mere nullity not entitled to any respect. It is of no use to say that the question of jurisdiction over that cause was in the last resort decided against the government by the Supreme Court; for, under the course adopted, that decision itself was also re-examinable.

But to prefer such course without proper means to pursue it (inasmuch as serious doubts may be entertained whether the Commission has the means) was probably to run risk of error, and injustice. "Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence they may now appear otherwise. * * * Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex equo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject." (Story, *On the conflict of laws*, § 607).

Besides for me that which the Commission was to decide was not the merits of the Venezuelan judgments, but the real justice of the claim itself; viz. that which was submitted to Sprotto, in January, 1830, arising out of the differences between the liquidation made by the treasurers, and that by Idler. To examine *de novo* the original accounts, upon which those two liquidations were made, was, in the actual state of things, the only right way to establish whether the Ogden liquidation contained "undue rebatements and substantial errors" by consequence of which Idler had been overpaid $37,000 at Bogota; or whether if, on the contrary, some items of charge against the government had been omitted therein which Idler had the right to add afterwards to his account, and by reason of which he became creditor of the public treasury, for the amount of $70,520.11½, which the

Treasury Court ordered to be paid to him in October, 1832; in short, the only correct method to make evident the rights of the parties, and the genuine justice of the claim.

2. As to the other point of disagreement, I cannot entertain any doubt that the political existence of Colombia definitively dated from the 17th of December, 1819. The law of that date, by virtue of which the said Republic was declared to be constituted, positively says:

"ART. 1. The Republics of Venezuela and New Grenada *remain from this day united as an individual one* under the glorious name of *Republic of Colombia.*"

"ART. 13. *The Republic of Colombia shall be solemnly proclaimed* in the towns and in the armies, with public festivals and rejoicings, which shall be done at this capital *on the 25th of the present December*, in commemoration of the birth of the Saviour of the world, under whose patronage *this longed-for reunion*, by which the State is to be regenerated, *has been attained.*

"ART. 14-2. *The present fundamental law of the Republic of Colombia* shall be solemnly promulgated in the towns and in the armies, *entered in all the public records, and deposited in all the archives of the chapters, municipalities and corporations, both ecclesiastical and secular.*

"The arguments of Bolivar," as stated by General O'Leary, in his Memoirs, "prevailed, and he had the good fortune to see his noble efforts meet with victory. *The fundamental law constituting the Republic of Colombia was sanctioned at Angostura on the 17th of December*, 1819, a memorable date in the annals of the country, for two reasons: because it was the day of the birth of the great Republic, and of its founder's death."

"Meanwhile, the Congress of Angostura elected the chief magistrates *the same day in which it decreed the Republic of Colombia.* Bolivar was elected president.

"In the short period of two weeks of unceasing labor and diligence, *Bolivar laid down the foundations of a great republic*, and dictated measures appropriated to ensure its progress at home, and to establish its credit abroad. To this end he appointed Don Francisco Antonio Zea, in whose ability and clear intelligence he had the greatest confidence, as special commissioner. Zea carried with him instructions *to examine all pending claims, to consolidate the debt, and to negotiate a loan. He ought also to solicit the recognition of the Republic of Colombia, and to conclude treaties with those nations wishing to do so.*"

General Francisco E. Gomez addresses himself to *His Excellency the President of Colombia, in writing to Bolivar*, from the city of Asunción, February 14, 1820.

General Santander, Vice-President of Cundinamarca, writes from Bogota, February 15, 1820, to *His Excellency the President of Colombia*, General Simon Bolivar, acknowledging the receipt *of the fundamental law of the Republic of Colombia.*

"On no occasion like the present one," adds General Santander, "does Your Excellency so justly deserve the glorious title of *Father of the Republic.* Your Excellency has liberated her from her tyrants, *has reunited her*, and will also present her, before the eyes of the whole world, *as free, independent, and organized.*"

Observe also how Bolivar himself speaks in his proclamation of March 3, 1820, the day of his entrance in Bogota, returning from Angostura :

"*Colombians! The Republic of Colombia proclaimed by the General Congress* (of Angostura) *and sanctioned by the free people of Venezuela and Cundinamarca* is the seal of your independence, prosperity, and national glory. The foreign powers, on presenting yourselves before them, *constituted upon solid bases.* * * * Spain herself, on seeing you standing up over the immense ruins, which she has heaped up within the boundaries *of Colombia.* * * *

"*Colombians!* The twilights of the day of peace already illuminate the sphere *of Colombia.*

"Cundinamarcans! I wanted to be convinced that you still wished to be *Colombians.* You answered to me, 'yes,' and I call you *Colombians.*

"Venezuelans! You have always shown the ardent interest to belong *to the great Republic of Colombia*, and your wishes are fulfilled. The aim of my life has been one: *the creation of the free and independent Republic of Colombia* between two brotherly peoples *I have succeeded! Long live the God of Colombia!*"

So Bolivar's reply to Morillo, who proposes an armistice, on April 21, 1820 :

"*The Republic of Colombia* congratulates itself to see the rising up of the day, in which Liberty extends her blessing hand over the unhappy Spain, and to see her ancient mother country follow her on the pathway of reason.

"*The people of Colombia* being determined. * * * I take the liberty to hand Your Excellency the fundamental law herewith enclosed (that of Angostura) which establishes the only basis on which *the Government of Colombia* can treat with the Spanish Government.

"A single cry resounds throughout *Colombia.*" (See the treaty of armistice).

Letter of Bolivar to Brigadier Torres, Spanish Governor of Carthagena; Turbaco, August 26, 1820:

"It is the summit of madness, and more yet, of ridiculousness, to propose to the *Republic of Colombia* her submission to Spain."

Another time, Bolivar, writing to Morillo in regard to the armistice, from San Fernando, October 26, 1820, says:

"I will give Your Excellency an idea of the bases that I propose for the armistice, in order that, should they be acceptable, Your Excellency may send his delegates to negotiate and conclude it at my headquarters.

"An armistice will be maintained during four or six months, *in all the departments of Colombia.*"

Finally, there is not one function of the domestic or external life of Venezuela and New Granada, subsequent to December 17, 1819, which does not appear to have been accomplished in the name *of the Republic of Colombia*, and by authority of the constitution of that date. Thereafter, there is not a single act of Bolivar, or of the vice-presidents of Venezuela, and New Granada, or the permanent commission of the Congress of Angostura, or the municipalities and courts of justice, which does not bear testimony to the fact that a new State, *de facto et de jure*, started into existence on the 17th of December, 1819, and that a new sovereignty was established in the world for all the effects of political and civil life, under the name of *Republic of Colombia.*, This is a fact well recognized thenceforward by history and international law, which is not permitted to-day to be put in doubt.

"Venezuela," says Calvo, "took part in the war of independence in 1811, *and was united in* 1819 to Ecuador and New Granada, *to form the Republic of Colombia.*"

When Idler sold to Torres, in 1820, the three invoices of flints, fire-locks, and muskets, he knew very well that he sold them to Colombia and not to Venezuela, which was already incorporated in the former; he knew it because his accounts for those invoices were made out against Colombia, and he always dealt with Colombia in regard to the liquidation and settlement of the same. This is a proof of fact beyond all question. Therefore, when, in 1830 Venezuela was again

severed from Colombia, he had no other right against her, if anything were still due to him, on account of the above-mentioned invoices, than that which was left to him by the agreement, concerning the partition of the general debt of Colombia, between the three sections which had constituted the said Republic. When a State is divided, the law of nations only requires that its obligations be proportionately distributed among the new States, into which the former has been divided.

For the same reason, the responsibility of Venezuela in this case could never be extended beyond the 28½ units of the debt of Colombia assigned to her by virtue of the aforesaid agreement; and I believe that this Commission cannot, in justice, impose upon her a larger one. Nothing done or said to the contrary by her own government or courts, or by the Board of Liquidation of Bogota, can have had for effect, to make her obligation to Idler, either better or worse. In order to change the right of the one, or the obligation of the other, it was necessary, previously, to change the facts which had produced them; and the facts that Idler contracted with Colombia, and that Venezuela only accepted the obligation of paying 28½ per cent. of the debt of the former, have not been altered.

Such is my opinion.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 14.

[August 6, 1890.]

FINDLAY, for the Commission :

This is known as the *San Pedro* claim, and originated as follows :

The *San Pedro* was a Spanish ship of the line, and having been despatched to Venezuela in 1815, with a military expedition under command of General Morillo, took fire off the coast of Cumana, exploded her magazine, and sunk, with a treasure of a half million Spanish dollars, to the bottom of the sea.

There she laid for twenty odd years, somewhere between the islands of Coche and Cabagua, an almost forgotten wreck, when Colonel Diego Vallenilla, at the instance and in behalf of his son, Antonio José, then in the United States, where he had been educated and married, petitioned the Secretary of War and Marine, General Urdaneta, for the privilege of fishing for the treasure which she had carried, although it is to be observed that the petitioner studiously avoided specific reference to the coin, and simply mentioned pieces of cannon and other effects as the object of the search.

The translation of this petition is very imperfect, but it would appear that the permission sought by Colonel Vallenilla was not only for his son, who was without capital and unable to conduct such an enterprise, but also on account of such persons in the United States as he might be enabled to persuade to unite with him in the undertaking. On the 15th of February, 1839, permission was granted as prayed, upon the simple condition that 5% of whatever was recovered should be paid into the Venezuelan Treasury, under the

supervision of the Collector of Customs at Cumana. And the original resolution granting the privilege appears to have been lodged with the U. S. legation at Caracas as a sort of security for whoever might embark in the enterprise.

Nothing was done until 1844, when, it would seem, a company, called the San Pedro Company, organized in Baltimore, through the efforts of Mr. Grafton L. Dulaney, who held a general power of attorney from Vallenilla, Junior, equipped a vessel with the necessary apparatus, and sent her out to Venezuela for the purpose of exploring for the lost treasure. How much was recovered, what profits were made, or losses suffered, the record furnishes no information; but it does show that the original company for some reason was dissolved and a new one formed under the same general management and power of Dulaney, and that this company also finally ceased operations, and was succeeded in turn by a Boston concern, which appears to have sent out a vessel, the *Eliza Ann*, in 1850, the history of whose proceedings, as far as the extraction of the treasure is concerned, is involved in the same obscurity as its predecessors. Dulaney, however, was the controller of this enterprise, as he had been of all the previous ones, by virtue of his power of attorney from Vallenilla. This instrument is not among the papers, and we only know of its existence from references made to it in other parts of the record; but it is within the personal knowledge of one of the members of the Commission who knew Mr. Dulaney, that he and Vallenilla had married sisters, and that, being a lawyer of the highest rank and worth in Baltimore, there is a strong probability that such a power had been given. Whether it was coupled with an interest or not is, of course, a matter of speculation on this record.

The *Eliza Ann*, after her last voyage to Venezuela, returned to the United States some time in the year 1851, and this closes the first chapter of this narrative in which it will be observed that the claimant nowhere appears as having anything to do with the enterprise.

On the 15th of December, 1850, according to the statement of Mr. Driggs, and as appears by a copy of the pap. attested as correct by that gentleman, a contract was entered into between him and Vallenilla, the provisions of which are, to say the least of it, peculiar. In the first place it begins with a recital that the Government of Venezuela has conceded Vallenilla the exclusive right and privilege to take the treasure from the wreck on the sands, which is quite an amplification of a permit which grants the privilege, it is true, but is entirely silent upon the question as to whether it was exclusive or not. If this recital is to be taken as a representation of what the original resolution expresses, it is simply false. If, on the other hand, it is to be accepted as expressing a conclusion of law, we may have something more to say about it further on. The contract then proceeds to state that a power of attorney has been given to Mr. Dulaney as stated, and after showing that the *Eliza Ann* had been sent out by him, and that she had made two voyages to the wreck, and that Vallenilla had received no money, and that on inquiring of Dulaney for information had been referred to the captain of the schooner, who declined to furnish any, it then became necessary to revoke Dulaney's power, which was accordingly done in his absence and without his knowledge or consent, by Driggs and Vallenilla, by the simple device of a recital in a paper to which they were the only parties.

After disposing of Dulaney in this manner, Driggs, and those who may be associated with him, are substituted in his place "with full, absolute, and irrevocable power for the term of five years;" Driggs & Company to pay all expenses of the enterprise, and to allow Vallenilla at the rate of five hundred dollars per annum as estimated profits, which, in consideration of the value of the franchise, Driggs agreed to advance, and did advance, as he alleges, in a lump sum of twenty-five hundred dollars. Whatever remained after payment of expenses and Government dues was to be equally divided between Driggs and his associates, at least so it appears by

the recitals in this copy of the contract as attested by Mr. Driggs. That gentleman, however, in a letter stating his case and addressed to Mr. Culver, U. S. Minister at Caracas, June 1, 1863, says that he rented the privilege from Vallenilla for five years for $2,500, payable in advance, and adds, "the amount though actually advanced and paid to Vallenilla was to be *deducted* from his *share of the profits* as previously received by him from his other associates," from which it would appear that the twenty-five hundred dollars were paid him not in absolute satisfaction of his claim, but contingently on the realization of profits or not. If the scheme was a success Vallenilla was to have his share of the profits, twenty per cent., and would allow the $2,500 as so much paid on account, if the accounting took place at the end of the five years, or if at the end of each year, as more probably would have been the case, would allow $500. According to this statement of his rights under the contract, he was entitled to receive a partner's share, without being liable for losses or expenses, subject only to what had been paid him by way of advance. According to the contract, or what purports to be such at least, he had no right or interest in the enterprise for a period of five years, and for that period surrendered its control to another under a power of attorney expressly made irrevocable.

In this same letter to Culver, Driggs fixes the date when the *Eliza Ann* suspended work, and says that it was on the 2d of March, 1851, from which it would appear that he and Vallenilla had revoked the power of attorney to Dulaney, while the last enterprise which he had organized was still a going concern, and nearly three months before the vessel employed by it suspended operations and returned home. Not only so, but he says that work was suspended, not abandoned, and he has a reason for using the one word and not the other, because he is answering a charge of Gellineau, the Secretary of the Treasury, who had revoked the permit, not merely because it was personal and not transferable, but be-

cause the enterprise had actually been abandoned for a period of six months.

To this charge Driggs replies that there was no abandonment but only a suspension; and that suspension was necessary at stated intervals in order to give the men who were engaged in this arduous and hazardous enterprise a time to rest and recruit, would not only be a reasonable presumption, but we know from the record as matter of proof that such suspensions frequently took place, and that the crew temporarily returned to the United States.

Such being the case the first question we have to ask is, by what authority or upon what pretence of right the Dulaney power could have been revoked? The pertinence of the question lies in this: that a man like Seth Driggs who seems to have spent one part of his life in getting into trouble and the other in getting out of it, and whose wits must have been whetted to a keen edge by this constant friction, would have warily scrutinized the legal bearings of any proposition with which he was called to deal, and would not have parted with his money until all doubts were reasonably set at rest.

He says, and we have no other authority for it, that he paid Vallenilla $2,500.00 cash money, on account of himself and his associates, as the price of a power, then the property of a third party in the United States, without his knowledge, participation, and consent. It is true he offers in proof a copy of a contract in which Vallenilla acknowledges to have received that sum of money, but the copy comes from Mr. Driggs, and the only reason we have for believing in its existence is the certificate which he has appended himself. We regret to say from the experience we have gained in this case as well as several others in which he has figured before this Commission and similar bodies, that we must require something more than his word as the token of absolute verity. The presumption that he would take such a risk as this is not only improbable in itself, but when we consider that according to his own confession he had "mortal enemies" among the high officials of the Venezuelan Government, in

connection with the precarious nature of the permit, and the absolutely uncertain nature of the enterprise, which, as far as the proof before us shows, does not appear ever to have yielded a dollar, it would require the very best evidence to satisfy us that Mr. Driggs had paid any money on the hazard of such a venture. But he says he did, and besides became responsible on an obligation to one John Barnes and his associates in the sum of ten thousand dollars, to be paid as damages in case these parties, who had contracted with him for expensive machinery, should suffer loss in consequence of a revocation of the license, or an interference with its enjoyment by the Venezuelan authorities, a provision which shows on its face that Driggs was not insensible to such a danger.

When Gellineau revoked the license on the 19th of May, 1851, Driggs, it appears, on the following first of June communicated the fact to Barnes, with the request that he would stop work on the machinery which he was then constructing, until further advised of the final determination of the Government. At this point, with the exception of the procurement by Driggs of certain papers, the case disappears out of sight as completely as the sunken treasure of the *San Pedro*, and does not appear for a period of four years, by which time, however, Mr. Driggs has perfected quite a complicated and in some respects ingenious and in others quite crude and awkward apparatus, by which it is to be again restored to the light. Considering, however, he spent two of these four years in prison, his activity is not to be sneered at. His manner of working was as follows:

He has himself sued in the district court in the city and county of Philadelphia by Barnes in an action of covenant, on the obligation referred to, but begins the action by titling and a summons for the defendant, on September 17, 1855, returnable on the second Monday of October. The return to this summons is "*nihil habit;*" but on the 25th of September, five days before the return day, certain papers called "copy

of agreement and statement" are filed and on the same day there is also filed by Driggs a confession of judgment for $10,000.

The "agreement and statement" comprise the following papers:

1. A translation of the petition of Colonel Vallenilla, in 1838, for the privilege and of the resolution granting the permit in 1839.

2. Translation of the alleged contract of the 15th December, 1850, between Driggs and Vallenilla.

3. The paper which is called the bond and which is dated January 2d, 1851, and witnessed among others by J. Smith, and who, with the others, although it was executed at Cumana in favor of Barnes, who never appears to have been out of the United States, all solemnly attest, that it was not only signed and sealed by Seth Driggs in their presence, but was also delivered.

4. The affidavit of J. Smith, made in Albany before Ira Harris, justice of the supreme court, on the 2d of July, 1855, that he was a witness to the instrument, and that the signature of Driggs was genuine.

5. A copy of a letter from Driggs to Barnes, dated Cumana, June 1, 1851, notifying him of the revocation of the permit by Gellineau.

6. Affidavit of Samuel Johnson, July 28, 1855, before John Woodward, justice of the peace, of Essex county, New Jersey, with accompanying certificate of clerk of court.

7. Deposition of John Barnes, headed "City of Philadelphia," and sworn on the 17th of September, 1855, before one who signs himself John Burns, commissioner, without any seal of office or other authentication.

These seven papers are filed in the case as the foundation of the action, and as the basis of the confession of judgment, although, as stated, no declaration was filed by the plaintiff.

It will be observed that paper No. 2 is not the original contract between Driggs and Vallenilla, but only what purports to be an English translation, and that all the copies of

the contract which appear in the *expediente* are taken from the original copy. The original itself has never shown its face, and that Driggs did not know or did not care what it contained is apparent from the indifference with which, at different times, he has given contradictory versions of its contents.

As to paper No. 3, it is to be observed that it is no more than a declaration of Driggs that he will be responsible to Barnes for $10,000, in a certain emergency. It is not a contract between the two by which Barnes bound himself to furnish the machinery, and other work in consideration of a share of the profits, but a declaration by Driggs under seal and in the presence of witnesses, that Barnes shall have a share, and, moreover, shall be indemnified to the extent of $10,000 for any losses he may suffer. It is signed and sealed by Driggs alone. Had Barnes been present and an actual consenting and contracting party, it is inconceivable that he would not have obligated himself to perform his part of the contract, and if he was absent in the United States, is it conceivable that Driggs would have made this declaration in his behalf without some corresponding engagement on the part of Barnes? He was to provide an expensive and novel apparatus upon which the whole success of the scheme depended. And he was to receive, according to one of Driggs' versions of the Vallenilla contract, one-third of the profits, and yet being present at Cumana when the obligation of Driggs to indemnify him in case of loss is executed, does not sign the agreement, or become a party to it in any way. For this reason we do not believe that Barnes was present; and that the attestation of J. Smith is either false in fact, or appears to be so by the adoption of a meaningless form. If such a paper was executed at Cumana by Driggs, all the circumstances surrounding its execution repel the presumption that it was delivered to Barnes. When it was produced and filed in the court in Philadelphia, we believe that Driggs was the man who produced and filed it.

No. 4 purports to be the deposition of J. Smith, the opportune witness, who never fails to be on hand when Driggs needs assistance, and whose services are so timely and attentions so assiduous, that one might almost mistake him for Driggs himself. Will any one answer the question why this witness should voluntarily appear and identify an instrument of this kind for the purpose of enabling a plaintiff to recover $10,000 against Driggs, whose faithful servant he has heretofore been in all the vicissitudes of a strangely chequered career? Remember, the affidavit was made in Albany on the 2d of July, 1855, two months and more before the suit was brought in Philadelphia.

Assume that there was such a man as J. Smith, and that he made the affidavit, who procured it to be done? Clearly not Barnes, assuming also that there was such an individual. Barnes did not have the paper which Smith was identifying, and which, by the way, he refers to in his deposition "as the foregoing paper," although it is not attached or made a part of his deposition, and only appears as the foregoing paper in the sequence of the *record* as made up. Had the paper been a genuine one on which Barnes, as a real *bona fide* suitor, proposed to institute an action for the recovery of a large sum of money, is it within the bounds of reason, that he would have sent it before suit brought to one of the witnesses, for the purpose of procuring a worthless *ex parte* identification of no probative value in court, and if he had, why would not the instrument have been attached to the deposition and made a part of the return? Next comes paper No. 5, which first appears by a reference made to it by Samuel Johnson, in the paper No. 6, and these two papers together make a very unfavorable impression upon the minds of the Commission. Of course, if the letter to Barnes was actually written and received by him, we should expect to find it in his possession, and he would be the proper person to produce it; but it appears by the affidavit of Johnson made in Newark, New Jersey, that this letter had been sent to him along with the Vallenilla contract, and that with these before

him, both of which appear to have been attached to his deposition, he was enabled to swear that Barnes had provided the machinery according to agreement and that it was in "a state of forwardness" and would have been despatched to Cumana in July, 1851, if the suspending order had not been received by Driggs' letter. The only reason he assigns for appearing in the case at all is that he was an engineer. He does not say that he was an engineer employed by Barnes, or what kind of an engineer he was, or what he had to do with the machinery, or where it was being made, in Newark or elsewhere, but only that Barnes was induced to undertake the job, and he knew that he was induced to do this by reason of the contract and other documents attached to the deposition. He knew, too, the exact amount that Barnes is going to lose by the operation, and that is $8,000.00, not counting loss of time, expenses, and prospective gains; and in this respect he agrees with Barnes to a cent. It is a peculiarity that distinguishes all the Driggs witnesses that they appear upon the stage without any previous or subsequent career, except as witnesses for Driggs. We shall show conclusively before we are done that this witness, Johnson, although ostensibly appearing for Barnes, is in fact a witness for Driggs, and we are constrained to ask the question why it was that Samuel Johnson, engineer, without further account of himself and without connection with or relation to either of the parties to a suit not yet docketed, should have made this single appearence before a justice of the peace in Newark and then disappeared from the scene of action forever? In what way did John Barnes, assuming that there was such an individual, acquire the information, that so useful and yet at the same time so useless a witness in any real controversy according to common-law methods, was to be found in Newark in the person of Samuel Johnson? Perhaps Barnes himself will explain, for we now reach in regular order paper No. 7, which contains his deposition. In this paper Barnes describes himself as "of the city of New York," and speaks of Driggs as then, 17th September, 1855, being in Philadelphia, where

the witness made his affidavit. The first thing that strikes one in this statement, is a sort of contradiction in the idea of a New York party suing Driggs in Philadelphia, unless he was a resident or citizen of that city and could be served with the proper process.

There is no evidence to show that Driggs was a resident of Philadelphia when in this country, and from what appears in other records in cases before us, we should infer that he was not. All his letters are dated from New York and that was his headquarters when he concocted the fraud we have exposed in No. 15. Of course if Barnes could have found and served him in Philadelphia the action could have proceeded in the proper court of that city. But the curious part of the transaction is that while Barnes brings his suit on the 17th of September, the same day on which he makes his affidavit, and in which he says that Driggs is then in Philadelphia, the sheriff makes return of the process which was issued on that day presumably to be served before he could leave town, that the defendant is not to be found. Barnes, like Johnson, gives no account of himself except that he is from New York, and makes no reference to Johnson whatever, nor does he explain where, by whom, under what contract, at what price, or of any of the circumstances affecting the transaction, which a real witness, telling the truth, would have deposed to, but contents himself with saying that he and his associates, without telling who or how many there were, had "carried into effect the desires of said Driggs and Vallenilla by purchasing all the necessary machinery," &c.

As before stated this deposition appears to have been taken by John Burns, Comr. (which we suppose is meant for commissioner), but who either had no seal of office or failed to attach or impress it upon the deposition, nor does he state what sort of a commissioner he is, whether for one of the States or the United States.

These papers having been thus prepared, as we believe, and as we think we can show, by Driggs himself, whether

with the aid of any of the parties named, it matters not, the next step in his fishing scheme to extract dollars from the Venezuelan Treasury was to confess judgment in favor of Barnes for the full amount claimed. This was done accordingly in New York on the 25th of September, by the defendant in *propria persona*, for it is to be noted that throughout this whole transaction, while the plaintiff Barnes has been careful to provide himself with an attorney by the name of Jermon, Driggs has triumphantly passed through the litigation *inops consilii*. A *fifa*, or execution, then issues, and is made returnable on the first Monday in November, but on the 4th of October previous, an entry purports to have been made by Jermon, the plaintiff's attorney, in these words, "*this case is satisfied in full.*" Having gone through all the forms of a suit, not in accordance with common-law practice, however, and having prosecuted it to judgment, his next and immediate move is to have the record of his proceedings exemplified. He first procures a copy of the docket entries, and on this paper there is affixed what purports to be, and what doubtless is, the seal of the district court of the city and county of Philadelphia. There is no authentication of the paper, however, by the prothonotary or the custodian of the seal. Then follows in regular order copies of all the papers we have heretofore sketched, and tied to them by a string is a printed form of exemplification according to the act of Congress in which the prothonotary certifies "that the foregoing is a true copy of the whole record in the case there stated." The president judge then certifies that the certificate of the prothonotary is in proper form, &c., and then in turn the prothonotary certifies that the person purporting to act as the president judge was in fact what he purported to be, and that full faith and credit ought to be given to his acts. There is no doubt in our minds as to the genuineness of this paper or any of its signatures, but we have a doubt whether it has not been detached from some other record and made to serve a purpose in this case for which it was never

intended. The paper is signed three times, twice by the prothonotary and once by the president judge, and each time the date of the signature is given. This date is the 3d of October, 1855, but the entry of satisfaction, which is certified to as a part of the record, was made on the 4th, the day after. This could only have happened upon the assumption that these officers made a mistake in the date and repeated it, or unless the entry was actually made on the 3d instead of the 4th, and a mistake was made as to its date.

Of course, such mistakes might have occurred, but the question is whether it is more reasonable to suppose that they were made than that Driggs, getting possession of this sheet in some way, appended it to these papers for his own purposes. Here the character of the man must determine the wavering balance, and taking this into the account, and what we know, at least believe, he has done in other cases, we must say, that the presumption of crooked conduct on the part of Mr. Driggs is much more violent than an innocent mistake on the part of these officers. In case No. 15, in which he plays a somewhat similar part as here, we had no difficulty in reaching the conclusion that the exemplifying paper used there had never been attached by the clerk to the record, in connection with which it was found, and so the condition of the papers here makes it doubtful whether such a record as this purports to be ever issued out of the district court of the city and county of Philadelphia, under its seal and the signatures of the prothonotary and the presiding judge. That Driggs went through the forms of a suit, resulting in the confession of judgment we have no doubt, and we have as little as to his purpose. It is perfectly clear that no sane man would have honestly and in good faith confessed a judgment for $10,000 under the circumstances this confession was made. There is no evidence worthy of the slightest credence that Barnes ever did anything or was bound to do anything by which he could make Driggs his debtor.

The $2,500 paid by Driggs to Vallenilla, if there is any truth in any part of the story, was paid on account of Barnes as well as Driggs, and each of them was bound equitably to share in the loss, but Driggs pockets the whole of it without a murmur, and then proceeds to pay Barnes in full for his machinery, time, &c., as for a total loss. No inquiry is made for the machinery, which one would think might have been sold for old iron at least, but it is all abandoned by Driggs, on the simple assertion of Barnes that it was useless except for the peculiar purpose for which it was constructed. Here then is a man who has spent his life in litigation volunteering a confession of judgment in about the only good case, as far as we are advised, he ever had; not only that, but as we believe furnishing the evidence to the defendant, which alone could furnish a plausible excuse for such a confession. It is impossible to accept such a hypothesis and preserve our character for sanity ourselves. What then was the motive of Driggs in all this elaborate preparation? It was a double one. His objective point was the Venezuelan Treasury, but in order to get there he must proceed by the path of an international reclamation. In order to do this it was necessary that a judgment should be recovered against him in order to establish his counter-claim, and it was equally necessary that the record of the proceedings resulting in this judgment should be authenticated in apparently regular form. To confess a judgment without the elements of the action appearing of record would be too transparent and bold an artifice. So he resorts to what may appear to a common-law lawyer, a very crude device, in filing these *ex parte* affidavits and copies of papers certified to by himself; but in the looser practice that prevailed in Venezuela where the record was intended for use, not such an empty expedient as it may appear.

He gets the docket entries copied and a seal attached, and then a crude sort of record is made up; just how and by whom we cannot pretend to tell, in which copies of all the

copies of papers he has made appear, as well as the different depositions, and to these he attaches the exemplifying sheet and without regard to the State Department at Washington posts the bundle to Caracas.

Mr. Eames was Minister there at the time, and although he falls into the error of authenticating the documents as being entitled to credit as a "legal judicial copy," cannot be imposed upon so far as to present the claim to the Venezuelan Government, but refuses to do so.

After remaining awhile on the files of the legation, the record is returned to the United States and sent to the State Department by Driggs from New York, and was received on the 27th of August, 1861. A copy is then made and forwarded to Caracas, and Mr. Culver, on the 10th of June, 1863, contrary to the action of all his predecessors, for the first time brings the case officially to the attention of the Minister of Foreign Affairs, and Driggs, with wonderful perseverance and pertinacity, at last has the satisfaction of knowing that his claim has at least a foothold at court.

It is not necessary for us after this statement to add anything on the questions of law involved, as we had first intended, for we put not the slightest faith in anything Driggs says, and without further comment the claim will be rejected and petition dismissed.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 10.

[August 6, 1890.]

FINDLAY, for the Commission:

This is another of the Driggs claims, and like all its fellows is as crooked as a serpent on a rock. The claimant, according to his own story, had loaned General Santiago Mariño, a distinguished citizen of Venezuela, a sum of money on the island of Trinidad in the year 1829, and had taken his promissory notes, which, unfortunately for Driggs, were afterwards lost by shipwreck at sea.

Subsequently the General accepted two drafts, one for a $1,000.00 and the other for $500, drawn by Driggs in recognition of an alleged indebtedness which he had incurred for the expense Driggs had been put to in several ineffectual efforts to collect the original debt.

The result of subsequent judicial proceedings with reference to these drafts was a contention on the part of Mariño that they in truth represented the original debt itself, and that Driggs had no further claim on him. This appears to have been the status of the parties in 1843. Nothing more is heard of the case until in the early part of 1852 when Driggs, failing to serve Mariño, in an action which he then contemplated instituting for the recovery of this old debt of 1829, the evidence of which had been lost as stated, and which the defendant declared had been adjusted by the proceedings of 1843, undertook to procure from a justice of Maracay a circular despatch for the purpose of taking the testimony of two witnesses, John Davis and Robert Taylor, whom Driggs himself describes as "transient persons." (See Letter to I. N. Steele, Chargé, 1 June, 1853.)

This despatch or commission was issued, and subsequently, some time in the month of March, 1852, a witness bearing the despatch himself appeared before the Alcalde, Juan Larrazabal, in the parish of El Valle, in the immediate vicinity of Caracas, and there made oath, and in reply to the interrogatories subscribed his name, to the answers, which were all prepared in writing and in the possession of the witness, who, after paying the costs and protesting that there were eight days' expenses—which he rated at 50 dollars—due him for detention, disappeared and was heard of no more until he turned up in Canada under circumstances which we will presently relate. About the same time another witness appeared at Petare in the same vicinity, and after inquiring of Poleo, the justice, whether he had received a despatch from Maracay, and being answered in the negative went away but returned in five days thereafter with a similar inquiry and on receiving the same answer said he would go to the post-office and inquire for the despatch himself. Shortly afterwards he *appeared with the document*, and having his answers to the interrogatories already written, signed his name, made oath to his deposition, paid the costs of the proceeding, and protested for twelve days' detention at an expense which he rated at seventy dollars. He, like the other mysterious visitor, then departed and was heard of no more until his reappearance in Maine was chronicled, in a manner we shall presently unfold.

General Mariño was then in Caracas, and learning that Driggs was taking *ex parte* testimony with a view to recovering his ancient claim for the debt of 1829, interposed an objection to the proceeding, and in some way hearing of the strange appearance of these two witnesses at El Valle and Petare, began an investigation, the result of which was to satisfy him that Driggs himself was the two witnesses in one. Driggs was accordingly on information laid before the Judge in Caracas by Mariño, arrested, and held to answer a charge of false personation and perjury.

It appears that after the return of the commission or despatch was made to the justice issuing it in Maracay, that official not being learned in the law determined to refer the objection which Mariño had interposed to a learned civilian in Villa Cura, and that Driggs was entrusted with the papers for the purpose of obtaining his opinion. On the return from Villa Cura with the deliverance of the learned doctor and the papers, he says he was taken sick on the road, and that he handed over these documents, which were in a bundle of clothes he was carrying, to a peon whom he met on the road, to be taken to Maracay, but the peon disappeared, and, as far as the record discloses, was never heard of afterwards, either in Canada or Maine.

Driggs was certainly one of the most unfortunate men that ever lived; for besides suffering the loss of his promissory notes by a marine disaster, he is now about to suffer the greatest calamity of his life by the mistaken confidence he has been foolish enough to place in an accidental traveller of mean extraction with no tie between them except they happen to be journeying on the same road, by depositing with him valuable papers, which ordinary mortals of a less confiding nature would have jealously guarded. For it is to be observed that here is the turning-point in the whole case: these papers constituted the *cuerpo del delito*, of which we hear so much hereafter, and it was the want of these which deprived Driggs of the means by which he would have established a triumphant *alibi*. Let us particularize a little.

The charge made against Driggs was that some time in the month of March, 1852—precise day not given—he appeared under a different name at two different places, and made and subscribed a deposition under oath, and on this fateful day on which he is journeying from Villa Cura to Maracay, he has these papers in his possession. Did he know that the charge had been made and steps taken for his apprehension? On the 3d of April process was issued from

Caracas to the judge at Maracay to investigate this charge, and as Driggs was not arrested until the 22d, it is impossible to believe that he was not fully alive to his danger.

Had he been an innocent man and the depositions in his possession what they purported to be, with this prosecution and arrest hanging over his head, is it conceivable that he would have parted under any circumstances with the very and the only evidence he had to establish his innocence? But when we are gravely told that he surrendered this evidence to a wayfaring man, a complete stranger, on his simple representation that he was going to Maracay, and that he gave them up in a bundle of clothes because he was too sick to carry them, the story is not merely shallow, it is silly. On the other hand on the assumption that Driggs knew that the officers of the law were on his track, nothing would be more probable than the destruction or the secretion of these papers. That they were not destroyed appears from the fact that they afterwards found their way into the Registry at Caracas, but this circumstance also shows that the peon, who failed to put in an appearance at Maracay with the bundle, must have been discovered, and if he was, Mr. Driggs owed it to himself to explain how, when, and under what circumstances the discovery was made.

On this point he is as silent as the grave. Driggs was tried on the charge, and there was no allegation and no proof of the particular day in March when the offence was committed. Neither the offence at El Valle nor at Petare was fixed on any specified day, but both offences are alleged to have been committed in the "past days" of March. This doubtless was an infraction of Venezuelan law as well as the law of most, if not all, civilized countries. Time here was of the essence of the charge; for while it may be true as observed by Señor Mendoza in his reply to the despatch of Mr. Eames that the material inquiry is whether, and not when the crime is committed, it is also true that on a general allegation of this kind the accused would be deprived

of legal defences of the most convincing character. Mr. Driggs himself very properly contends that the proof shows that he was in three different provinces of Venezuela, widely separated, during the month of March, having been in the province of Caracas only part of the time, and that if the precise day of the month had been given when it was alleged that he was in the two villages named, he might have shown that he was elsewhere. He also says, and proves by a number of witnesses, that on the 16th of March, which afterwards appeared to be the date of this double visitation at El Valle and Petare, as it was gathered from the original depositions recovered from the peon, no one knows how, he was actually at La Guayra, and had been from the 12th, and there remained until the 24th of March. If Driggs had been an innocent man, and the depositions had been made and sworn to by others than himself, the date being then and there fixed, he would have produced instead of secreting the papers, and then would have called upon his witnesses to establish an *alibi*. The matter was quite fresh. He was in Caracas on the 12th of March, and left on that day in Delfino's coach for La Guayra, and had a travelling companion who afterwards identified him as a passenger without difficulty. He had his receipt for board, which also included stage fare, the date of which was an evidence in his favor. Numerous witnesses testified that he was at La Guayra during the dates mentioned, and among them, although after the trial, his ubiquitous and ever-faithful friend, James Smith.

It is impossible that Mr. Driggs, within a month afterwards could have forgotten these circumstances or been insensible to the fact that any attempt to locate him on a particular day at a given point when he was actually somewhere else, could not be met with a complete refutation. When therefore he complains that he was unlawfully convicted, because among other reasons, the *corpus delicti* was not produced, we cannot sympathize with him very strongly,

however much we may regret that the law was violated, as he was the very party who had possession or control of these papers, and could have produced them at his trial, or before his arrest, and had they been genuine and not false and simulated, must have established his innocence. It would seem that the justices of the peace before whom the depositions were taken have a very loose way of doing business, for one would suppose that a record of some kind of their proceedings would be absolutely necessary, and this record, if kept, would have shown the date when these unknown witnesses appeared and testified as stated. But there was no record, and these functionaries when called upon had to rely upon memory, and in consequence were very much in doubt both as to names and dates. Their general account of the transaction was that at some time during the hours of audience between 9 and 12 o'clock a complete stranger, unknown either in Petare or El Valle, and a foreigner, made his appearance and signed the answers already prepared under the circumstances before detailed.

Now, a little docket entry to this effect would have saved a good deal of conjecture and speculation as to who this mysterious individual was, and at the same time any difference between the date so established and the day named in the depositions themselves might have suggested a possible alteration by the party in whose custody the papers were placed, especially if he had a powerful motive to make such a change. Mr. Culver, in his despatch to Señor Marcano reviewing the evidence of Poleo and Austria the Secretary, says that it would be "absurd" to suppose that the postmaster would deliver an official despatch from the judge at Maracay to the judge at Petare to a perfect stranger when the officials of the court were the only persons authorized to receive such documents, and in this conclusion we quite agree; but suppose Driggs was the man, as charged, is there anything improbable in the theory, that he had the despatch in his own pocket, and that the visit to the post-office was a mere pretence to give a sort

of color of truth to his actions? Whoever the party was who appeared in El Valle was the bearer of the despatch; and it is made quite clear that the common-law precautions with reference to the issuance, execution, and return of commissions which are observed in the United States are not in vogue in Venezuela, or, at all events, were not followed in this case. Driggs admits himself that he had these depositions after they were executed, and that they were unfortunately lost through the dishonesty of the peon to whom they had been entrusted on the road to Maracay.

It is a concession in the case that the man who made the affidavit at El Valle, whoever he was, produced the despatch or commission authorizing the justice to take the deposition. There is, therefore, not the slightest improbability that the man at Petare, whoever he was, was also the bearer of the despatch, and that the story about the post-office was a pure fabrication.

Driggs, according to his own account, was in Caracas from the 3d to the 12th of March, and General Mariño saw him there at the table in the hotel of which both were customers. During the same period John Davis and Robert Taylor, in whose names the false personation was conducted, were also sojourners in that city according to the testimony of Driggs' witnesses.

His allegation is, his whole case is, that these persons were not myths, the coinage of his own crooked and intriguing brain, but actual living men, with a local habitation and a name, and, moreover, important witnesses in a case he was about to prosecute against one of the most influential personages in Venezuela. Let us take him at his word and accept this statement for the time being as true. These men were in the city because they left it on the 16th and one had been detained eight and the other twelve days for the purpose of making these depositions, and consequently they must have been, or we may assume with great reason that they probably were, in Caracas, one of them four and the other eight days, during Mr. Driggs' sojourn there.

On such an assumption, will any one explain why the plaintiff in this proposed suit in the same town with his witnesses did not attend in person, or by attorney, to the examination of them himself?

It could not have been for want of a commission, for that would have issued at his instance as easily in Caracas as Maracay, or if he was entrusted with the despatch issued at Maracay, he could have proceeded under it, and taken the answers of the witnesses. There was every reason for expedition, for the story is that one of these witnesses was in a great hurry to go to Guyana and the other to Barcelona, and both of them claimed damages for the detention. With so much cause for haste why did Mr. Driggs put off the examination when he was on the spot and could have given it his personal attention, and at last go off to La Guayra on the 12th, leaving Davis and Taylor fretting and chafing under the delay, to go out to two villages each several miles distant from Caracas and there give in their testimony? That Driggs was not in the habit of conducting business in this way is proven by the very next step he takes in the case, for his visit to La Guayra, according to his own account, was for the purpose of executing a despatch for the examination of two witnesses by the name of Outlaw and Hill in this very case. He took out a passport there for Puerto Cabello on the 12th, and it was this examination which delayed his departure until the 24th of March. He was there giving it his personal supervision, and why he did not avail himself of the opportunity when he was in Caracas to execute the despatch for the examination of Davis and Taylor, is a mystery which, we are sorry to say, can only be explained upon the hypothesis of the charge that they were myths and he was the person who personated them. Look at it in another light. Driggs, we may assume with reasonable certainty, was not unknown in Caracas. About a year before these transactions he had been mixed up in the San Pedro affair; he had the cocoa claim and a variety of other matters which would necessarily take him to that capital.

There would be a strong reason therefore why Driggs would be afraid to show his face in any of the tribunals there in any such scheme of false personation, and why, to conceal his identity, he would betake himself to obscure villages in the vicinity. As to Davis and Taylor, however, no sensible reason could be given why they should travel miles out to make an affidavit before a country justice of the peace when the city was full of officials competent to discharge that function. They were in a hurry, too, to get away, they had already been detained an unreasonabe time, they had been put to expense, and yet, according to this statement, these belated and injured witnesses take an hour or two's ride on a mule into the country for the purpose of answering a few questions, their answers being already prepared and in writing, and stranger still, pay the costs of the proceedings when all they had to do any day was to go down street and make the same affidavit, and collect the costs, as well as a reasonable amount for detention, from the plaintiff himself, who was temporarily sojourning in the same town! Now, although Driggs described these witnesses as "transient persons" he has made quite a labored effort to give them a foot-hold upon the earth, and to prove that they were not unknown among the sons of men. According to the custom prevailing in Venezuela, he has several witnesses declare *ex parte* with a view of coming into court and ratifying their declarations in a formal and solemn manner.

Rodriguez declared that he knew Taylor in 1849; that he was then living in Santa Rosalina, between the corners of Governador and Muerto; that he has seen him since, in the month of March, 1852; he encountered Taylor and spoke to him; he asked where the house of the Governor was, as he wished to take out a passport for Barcelona.

Taylor said he was to give a declaration in Petare. Sebastian Morales gives the same testimony, in substance, and Espinosa also says positively that he knew Taylor in 1849, in Santa Rosalia, and saw him in Caracas in March, 1852.

Now, what is such testimony, allowing it full competency, worth? With the single exception of the alleged residence in Santa Rosalia there is not a word which throws a ray of light upon the history, occupation, character, or any of the circumstances which constitute the personality of the individual to which it refers. But the addition of the very circumstances which are necessary to connect him with the case without further account of the witness, are, to say the least, calculated to excite a high degree of suspicion. Why should Taylor have said to this witness that he was to give a declaration at Petare? And why did the witness fix upon the month of March, 1852, as the time when this unsolicited, purely voluntary, and as far as we can see, unaccountable declaration was made. Had the parties been intimate in social or business relations it would be easy to understand how such a matter might have been mentioned, but as far as the record shows, Rodriguez and Morales simply knew Taylor, and without explaining how or why, they declare that this man, who, for anything that appears, may not have known them further than to speak, casually, and in the most hap-hazard manner, fell to talking about a matter in which they do not pretend to have had the slightest interest or concern. But more remarkable still is the identification of Davis, Liso declaring, as the previous witnesses, that he knew him and saw him in Caracas *in the month of March*, 1852; that he was going in the direction of El Valle, in the *middle* of March, and encountered Davis on the road going to the same village; he asked Davis where he was going; he said to the same village to give a declaration in the tribunal on a *business of Maracay;* that he was positive he accompanied Davis to the door of the tribunal, in which he entered. Here, it will be observed, that Davis not only tells the witness that he is going to make a declaration, but identifies it with the Maracay despatch, and the witness appears to have gone to the very doors of the tribunal with the declarant. Hernandez, another witness, declares that he positively saw Davis in the month

of March, in Caracas; that he, the witness, was going in the direction of El Valle, in the month of March, encountered Davis on the road to the same village; asked him where he was going; said to the village, to render a declaration in a business from Maracay; and that he also positively accompanied him to the door of the tribunal. Here are two witnesses telling identically the same story, with such an exact coincidence in matter of essence and accident as to arouse the keenest suspicion and distrust.

Both state they knew Davis, but what the extent of their knowledge was, where Davis came from, what was his occupation, residence, or any other particular concerning the man, neither has a word to say. Just here the question is very pertinent, why witnesses in possession of such valuable information were not called upon to testify while Driggs was on trial. It nowhere appears that the traverser was denied process to summon his witnesses, employ counsel, and conduct his defence according to the established methods of criminal procedure.

On the contrary he appears to have had able counsel, and the fullest liberty to summon whom he pleased. Two witnesses, Silva and Garcia, were actually examined at the trial for the purpose of establishing the existence of Davis, and why Liso and Hernandez were not summoned and examined at the same time is another circumstance among the many omissions in this remarkable case, which calls an explanation from Driggs, and which he fails entirely to supply. But it is ever to be borne in mind that the prisoner himself, unless we believe the stupid story of the abstraction of the documents by the peon, had the means in his own possession of tracking, at least, if not running down, both Taylor and Davis. The missing depositions made at El Valle and Petare turned up, as we have stated, in the Registry at Caracas. By recitals contained in them it appears that Davis stated that he was domiciled in the Island of Trinidad and that he was bound for Guayana, and that Taylor likewise stated that his place

of domicil was the same, and that he was on his way to Barcelona.

Now assume that Driggs was innocent, and that these depositions had actually been made by the parties whose names were attached to them, it seems to us that a man in his predicament, and who appears not to have been without means, would have made some effort during the long pendency of his trial, or succession of trials, to procure these witnesses, and establish his innocence. He might have made the effort and failed, but the record, while it shows that he was laboriously engaged in hunting up testimony to prove that Taylor and Davis existed, discloses also the fact that no effort was made to produce these individuals themselves, who certainly could have supplied unanswerable proof as to their own identity. Not only so, but the different and widely separated quarters in which he makes search for proofs of their identity at Caracas and in the neighborhood, and afterwards in Maine and Canada, neglecting the very spot which both declared as their place of domicile, and which had been his also, throws a doubt on the genuiness of his efforts which is almost insuperable.

If Davis and Taylor actually resided in the Island of Trinidad, numbers of people there must have been acquainted with the fact, and surely would have been willing to have testified accordingly. Even if he had not been able to avail himself of their testimony during the trials, how can he or any one else explain, having regard to the looseness with which *ex parte* declarations afterwards to be ratified are accepted, that no proof of this kind was ever taken in Trinidad to be used in Venezuela?

If there were no other circumstances in this case strongly tending to establish his guilt, we should regard this failure to go to the only place where the proofs he most needed could be supplied, as presumptive evidence of the highest order that the evidence did not exist.

Driggs was released from prison on the 22d of April, 1854, after serving a term of two years, dated from the day of his

arrest in Maracay. Not long afterwards we find him in the United States, and we have shown in the San Pedro case, No. 14, the character of his operations whilst in that country. He was also there in the same year manufacturing proofs to establish the destruction of his goods at Carupano, the history of which is detailed in No. 15.

By a very singular coincidence soon after his arrival, Davis, who has not been heard of since the day he appeared at El Valle, is resurrected at Montreal, and Taylor at the same time appears at Portland, in the State of Maine. James Smith, too, who was with Driggs in March, 1852, at the Steamboat Hotel at La Guayra, and who would have been a most important witness to establish his *alibi*, but who fails to put in an appearance at the trial, turns up in New York. Mariño, so Driggs says, died on the very day that the unfortunate victim of his cruel persecution was restored to liberty; but with remarkable forbearance, and in the purest spirit of Christian charity, Driggs forgave his enemy and prayed, although with an uneasy doubt as to results, that God would do likewise, and then straightway revives his stale claim against the heirs of the dead man for the old debt of 1829.

In this suit he has the declarations of Taylor, Davis, and Smith ratified, and although they had been formerly used for the purpose of establishing his innocence affirmatively, are now made to perform the double duty of proving the claim against the Mariño heirs. He has also a copy and the original of a letter dated Barcelona, May 30, 1852, and purporting to come from "R. Taylor," sent to the State Department at Washington, with a very suspicious-looking certificate in Spanish to the effect that it was the identical letter which certain witnesses referred to at the trial. This letter was addressed to "Seth Driggs, Caracas," nothing more, and bears the post-mark of La Guayra. The writer says that he sends it by private hands, we presume, via La Guayra, in order to secure its prompt delivery.

It is written in a cramped hand, and while by no means like the usual handwriting of Mr. Driggs, bears certain marks by no means inconsistent with such paternity.

Driggs was capable of writing an exceedingly clear, fine hand, but that he could not have achieved such a labored specimen of chirography as the one before us, is a proposition we are not willing to admit.

In the first place, we have shown that all the presumptions are against the existence of such an individual as "R. Taylor," and a letter purporting to come from him, therefore, does not add a particle of weight to his claim for recognition. In the second place, while the letter is dated Barcelona, the place to which Taylor said he was going when last heard of at Petare, the post-mark is at La Guayra, where it is conceded the letter was put in the post. The communication between this place and Caracas, where Driggs was then in jail, was easy and frequent as compared with Barcelona, and, therefore, assuming Driggs to have been the author it would have been easier for him to have had it sent from the former than the latter place. Again, Driggs, who had the declaration of Taylor in his possession, or under his control, was the only person who knew his destination was therein stated as being for Barcelona. Intending that this declaration should be forthcoming whenever the exigencies of his case required it, there would be a strong reason why he should have named this town as the place where Taylor was sojourning; whereas there is no satisfactory reason given or suggested why Taylor, who, it is alleged, left Caracas on the 16th of March for Barcelona, should still have been lingering there on the 30th of May.

Assuming Driggs capable of writing the letter, it is just such a one as we would have expected from him in the difficulty with which he was then embarrassed. He had no previous communication with Taylor acquainting him with the charges and the fact of his arrest and imprisonment. Here is another suspicious circumstance for Driggs to explain. If Taylor

was in Barcelona, and he knew it, or at all events knew that that was the place he started for, why did he not communicate with him at once and request his assistance? But he does not do this, and Taylor, according to the statement of the letter, first learns of his unfortunate condition by accidentally reading an account of his arrest in a Caracas newspaper. The arrest took place on the 22d of April, and this letter was written on the 30th of May.

The news must have been rather stale, and it is also very strange that such an item should not have been talked about by people who were more alert as to what was going on in the world than Mr. Taylor, and that he should not have heard of it, until by sheer accident he stumbled on this old newspaper containing the intelligence. However that may be, as soon as he reads the item he sits down and writes to Driggs in the very first sentence that he is a badly calumniated and libelled man, and that the charge is ridiculous as well as false, and then proceeds to give his version of the visit to Petare and the execution of the despatch in exact conformity with Driggs' defence. He says that he paid *five dollars* as the costs of the tribunal, which he considered exorbitant, but tells Driggs not to allow such a trifle to worry him, as they will meet before he dies and can have a settlement.

We have already referred to the gross improbability of a witness who had already been put to expense by detention in addition paying the costs of the proceeding, but this statement was made in the declaration which Driggs had, and had to be repeated here for conformity's sake. Taylor says that he had come to Barcelona to meet a friend, and he was going to start for the *Orinoco* to meet another friend, and then was positively engaged to embark for the Colonies, or otherwise he would return to Caracas and help Driggs to confront his enemies. This general account of his future movements could not have availed better for excusing Driggs for not hunting him up, than if it had been expressly designed by Driggs for the purpose. Taylor also had a fling

at the General (Mariño) and says he knows that he owes you (Driggs) a large sum of money. He then states that he had called upon Driggs at his hotel in Caracas, but was informed that he had left for La Guayra. We have already expressed our wonder that Taylor, one of Driggs' principal witnesses at Caracas, as detained somewhere by the Maracay despatch, did not communicate with the man who needed his testimony; and it would appear that Driggs, if he was the author of this letter, had his own curiosity upon the subject excited, and proceeds to resolve the mystery. He had left for La Guayra on the 12th of March. Still we are not satisfied, for Taylor on the 16th of March declared he had been detained twelve days waiting to deliver his testimony, and as he does not account for himself anywhere else we think we have a right to presume that he was in Caracas; and if he was, his sojourn there must have been coincident with that of Driggs in the same place, to the extent, at least, of four days. In fact, Taylor was in Caracas, for according to Eames' despatch, he swears he was detained *there* solely on Driggs' business. Still, it may be that Driggs did not write the letter, but we have no belief whatever that it was written by any one except a person under his immediate instructions. It may have been written at La Guayra by some friend, from data furnished by Driggs, and mailed from there to get the benefit of the post-mark. Still, if the hand is that of Isaac, the voice belongs to Esau. Mr. Eames, who reviewed this case in an elaborate despatch, addressed to the Minister of Foreign Affairs, Señor Gutierrez, under date of January 25, 1857, sums up his findings in four propositions: first, that Driggs had affirmatively proved his innocence, and that he was, in fact, innocent of the charge made against him; second, that, contrary to all law and precedent, he had been tried without a specification of the day on which the alleged offence was committed; third, that the unsworn certificate of the alcaldes had been admitted in evidence, and that on these he had been convicted, contrary to the law

generally, and to the law of Venezuela; fourth, that by that law, there must be two witnesses to each offence, whereas in this case there were two separate offences, each established by the testimony of a single witness.

On this showing the learned counsel of the United States contends that striking out the first proposition and conceding the actual guilt of Driggs, still if he was not convicted in accordance with recognized principles and methods of criminal procedure, as established by the laws of Venezuela, there is a good case made out for reclamation, and it is the duty of this Commission to allow punitive damages. On a calm review of the law and evidence as stated by Mr. Eames, we are forced to the conclusion that Driggs was not strictly tried according to law, and that his consequent sentence and imprisonment was a miscarriage of justice. Without going minutely into this question, it must suffice to state that the law seemed very clearly to require that the day of the offence should have been specified, and it ought to go without saying that the unsworn certificate of the justices of the peace ought not to have been admitted in evidence against him. These certificates had not even the excuse of being made in the ordinary course of official duty, but were simply statements unverified that the witnesses recognized Driggs as the man who had made the depositions before them, some time in the past days.

It is also claimed that the law of Venezuela requiring two witnesses to each offence had been violated owing to the fact that Austria and Hernandez, the two Secretaries to the Alcaldes, had changed their minds after testifying at the first trial, and although positive then as to his identity, were not so sure when subsequently examined, Austria, in fact, swearing directly the other way. The old man Froncoso, too, was attacked in his character as witness for partiality towards Mariño, and for imperfect vision which required the aid of two different kinds of spectacles, one for long and the other for short range, he having neither on when the stranger whom he afterwards identified as Driggs, appeared at El

Valle in the person of Davis. With these witnesses omitted, there was only left the testimony of the two justices or Alcaldes, each testifying to a separate and distinct offence. This is by no means clear to us. As tried in the Court of First Instance all these witnesses testified, and had no difficulty in identifying Driggs as the guilty party. What may have wrought a change of mind or heart subsequently may be accounted for on an assumption which it is not necessary to make, but whatever it may have been, everything in the case satisfies us that if any mistake was made it was in the second, and not in the first instance.

Assuming, however, that Driggs was not tried in strict accordance with the requirements of Venezuelan law, what is our duty in the premises?

On the one hand we have a man whom we believe to be guilty of the charge made against him; and also an opinion that he has not been legally convicted of the offence. As to one of the alleged defects in the procedure, the failure to name the day on which the offence was committed, we are fully satisfied that the traverser put this out of the power of the prosecution to produce. At the same time trial and conviction, according to law, are as necessary for the protection of the citizen as the establishment of law itself as a rule of action by which his conduct is to be governed. One, indeed, is practically valueless without the other. Of what avail would it be to a man to be shielded against apprehension, except for plain, specific violations of the law, if he could be tried or convicted after arrest by the will of the triers, instead of the law? There would in such a case be only a substitution of despotic will in the tribunal of justice in the place of its exercise outside such limits; nor can the status or character of the individual concerned affect the question.

The greatest criminal brought to the bar of justice is entitled to be tried according to the law of the land, not because he is deserving of any special sympathy or consideration, but because of the respect due to the law itself. Driggs there-

fore was entitled to be accused and tried as the law of Venezuela provided, and the record seems to show that, in some particulars at least, this was not done; and although we believe him guilty we cannot say that he was not the victim of a wrong for which reclamation should be made. What then shall be the measure of damage? The old Commission in this case allowed Driggs $100,000, fifteen per cent., or $15,000 of which has been paid by Venezuela, and with interest to date would amount to more than double that sum. This, we think, under all the peculiar circumstances of this case, is a sufficient allowance by way of indemnity for the wrong she committed in not trying a guilty man and convicting him according to principles and methods of procedure established by their own laws; and as this sum has been paid, we will dismiss the petition and reject the claims.

Claims of

JOHN E. GOWEN and FRANKLIN COPELAND
v.
THE UNITED STATES OF VENEZUELA. } *No.* 16.

[August 15, 1890.]

FINDLAY, for the Commission:

The claimants in this case, early in the year 1854, discovered a deposit of guano on some barren rocks, situated in the Carribean sea, near the mouth of the Gulf of Maracaibo, and known to geographers as the Los Monges, or the Monks. This group of rocks at the time of the discovery of the guano was uninhabited and uninhabitable, there being no vegetation and no water, nor were there any visible signs to indicate that they had ever been occupied by any human beings. Their only denizens would appear to have been the sea birds, who, in the long course of the centuries, had excreted a substance now known as guano, and recognized as one of the most valuable fertilizers, but the value of which, according to statements made at the argument, was not known prior to the year 1818, and which did not come into general use until a few years before the discovery of which we are speaking. Specimens of the deposit were sent to the United States, and after analysis by experts proved to be exceptionally rich in the essential elements which constitute the commercial value of this substance. Extensive preparations were then made by the claimants to develop the beds, and for this purpose the necessary plant, men, and materials, were shipped from the United States with instructions to hoist the United States flag and take possession of the islands or rocks in the name of that country, and for the use and benefit of the claimants. This was done in December, 1854, and thence onwards until stopped in the manner we shall presently relate, the guano deposit was vigorously

worked, and large quantities shipped to the United States and elsewhere. It would seem that certain Philadelphia parties ascertained in some way this lucky find of their Yankee brethren from Boston, and quietly, upon the assumption that the islands belonged to Venezuela, took a lease from that government, the terms of which are not known to us, as this lease is one of the papers which Venezuela has failed to furnish, although long since requested to do so by this Commission.

As soon as it was consummated, however, or very shortly afterwards, a Venezuelan war vessel made her appearance at the islands, put on shore a file of soldiers, seized the plant, buildings, and materials, and expelled the manager and his men under threats of imprisonment. One vessel ready to load was permitted to do so only on the payment of $500, and several others which had been chartered were sent back to the United States empty, out of which grows a claim for false freights estimated at $25,000. It is also claimed that some $250 in specie, belonging to the claimants, was seized and appropriated. These spoliations occurred on or about the 1st of December, 1855.

On the following 10th of January, 1856, a contract between the claimants and James Lee & Co., representing what is called the Philadelphia Guano Co., was entered into, the preamble to which recites as follows:

"Whereas, by a certain agreement in writing made on the 29th day of September, one thousand eight hundred and fifty-five, between the Government of Venezuela, of the first part, and John F. Pickerell, his associates and successors, of the second part, the said parties of the second part were authorized and empowered to explote, sell, and export guano from all the islands of the party of the first part, on which said substance may exist, among which said islands are the Monks or Monges Islands hereinafter named; and whereas the said parties of the second to said contract have constituted the Philadelphia Guano Company; and whereas James Lee and Benjamin C. Lee, doing business in the city of New York under the firm name and style of James Lee & Co., are the general agents of the said the Philadelphia Guano Company, and such have full power to make the agreement hereunder written: Now, therefore, this agreement made, &c. Witnesseth, &c."

By this recital it seems that the Government of Venezuela leased the islands to the parties and their associates, who

were afterwards incorporated as the Philadelphia Guano Company, on the 29th of September, 1855, and it is fair to infer that the lessor took possession of the islands in the following December in order to deliver possession to its lessees.

The seizure, it will be remembered, had taken place on the 1st of December, but prior to this, some time in June, the occupants of the islands had been notified by the Venezuelan authorities, appearing at that time in ineffectual force, that they must either leave peaceably or be forcibly ejected. And taking into account the contract of the 10th of January, 1856, it would seem that the claimants had improved the interval between the date of the lease and the seizure to negotiate with the Philadelphia parties for a continuance of the work, under a sub-lease from them.

What was done on the islands between the date of the seizure and resumption of work under the contract, the papers do not disclose. That the buildings, plant, and machinery were not carried away and appropriated, except as hereinafter shown, by the Venezuelan authorities is probable, however, as appears from a provision in the contract itself.

The second paragraph of the contract reads as follows:

"The said John E. Gowen & Co. are to pay all charges and expenses of every sort and description incurred in exploteing, digging out, shipping, and exporting said guano from said islands, and also the freight on the same to its several ports of destination, and also the *export duty* or toll agreed to be paid to the Venezuelan Government by virtue of the aforesaid contract, and are also to pay the said the Philadelphia Guano Company the sum of *five* dollars lawful money of the United States per ton, over and above said expenses, freight charges, duty or toll, for every ton of said guano so exploted and exported, and *are to leave upon said islands at the expiration of the said fifteen months* (the term of the lease) *for the benefit of the said, the Philadelphia Guano Company, all the materials of every kind there used by the said John E. Gowen & Co., in exploting and digging out the said guano.*"

From the latter portion of the paragraph, which we have italicised, it would seem that as a part of the consideration for the sub-lease of the guano beds for a period of fifteen months, the claimants agreed that the Philadelphia Guano

Company should have all the plant used in exploiting the dedeposits, and as this agreement was made a little more than a month after the seizure complained of by the Venezuelan authorities, it is not unreasonable or improbable to suppose that the plant was simply held by them until they were notified of the agreement between their lessees and the claimants. In other words, there is no evidence before the Commission that Venezuela seized and appropriated the plant for her own use, or that she used the plant in the interval between the date of the seizure and the time when work was renewed under the sub-lease or contract of the 10th of January, 1856.

What she appears to have done was to expel the men employed by the claimants, and then to have seized and held the plant, buildings, &c., until the agreement with the Philadelphia concern was consummated, after which work was resumed and conducted as it had been prior to the seizure. The question then arises at the very beginning of the case as to her right to make this seizure, and the Commission, without going minutely into the question of boundaries, the law of headlands, and of derelict property, are disposed to rest their decision upon the simple proposition that the claimants, in taking possession of a barren rock, or group of rocks, in the high seas, unoccupied and uninhabited, and as far as the proof shows never occupied, for the temporary purpose of removing a valuable deposit, which they were the first to discover, cannot be treated as trespassers, subject to be removed by the strong hand, and to be despoiled of their possessions without redress.

Whether New Granada or Venezuela had the better claim to sovereignty or to which territorial garment the fringe composed of these island rocks may be said to adhere, is a question much too serious and far-reaching in its consequences with the limited resources at our disposal to determine, and besides is now pending, as we are imformed, before the Spanish Cabinet to which it was referred for arbitration by the agreement of both of these countries.

We are not sitting here with power to determine vexed questions with respect to boundaries, and we have no authority to take testimony or examine witnesses on such questions, and if we had, the time allotted for the work of this Commission is too circumscribed to justify the undertaking of so formidable a task.

The only question in the present case which we will dispose of is whether a wrong was done in dispossessing and despoiling the claimants in the peculiar circumstances under which they made their discovery.

It is not claimed that they discovered the islands, the names of which disclose a Spanish origin, and which, in fact, had been marked down on maps centuries before, but their claim is that they, for the first time, set a human foot on their rocky sides with a view to reducing into possession a substance, the existence of which was a secret to the rest of the world, and the value of which had only been recently demonstrated.

These islands were nineteen or twenty miles out at sea from the nearest coast. A gap which might almost suggest that the fringe did not belong to any government, but was waste territory of its own, not subject to any jurisdiction. The argument was made that they were in the track of commerce, and from a military point of view, either offensively or defensively, might be made strongholds for friend or foe; but admitting this, the force of which, however, was very much weakened on a closer examination of the precise location of the islands, the question that we are dealing with is not one of sovereignty or of ultimate ownership, but of temporary occupancy for a special, limited purpose, peaceable in its origin and purely commercial in its character. It is true that an attempt was made to take possession in the name of the United States, but this was a nugatory act and without significance or consequence. The United States never claimed jurisdiction and made no protest when its flag was hauled down under the orders of the captain of the Ven-

ezuelan man-of-war. The islands were occupied for the purpose of obtaining guano, and would have been abandoned as soon as this object had been accomplished. There was no flag flying to indicate that they were claimed by any other power. If the islands had been in the middle of the Pacific Ocean, without trees, grass, or water, and nothing but a group of barren rocks, with only a name and a place on the navigation charts, there could be but little question that their occupation would not constitute a trespass.

If this is true of islands a thousand or two thousand miles from shore, the only reason that it is not true of similar formations twenty miles out, must arise from the opportunities which spring from such proximity to the mainland.

We are speaking now of an occupation merely as distinguished from an actual appropriation with a view to sovereignty, and in the absence of exceptional circumstances we can see no reason for distinguishing between the occupation of the Monks Islands and a similar unoccupied group in the mid-Pacific. It follows from this that the claimants are entitled to be reimbursed for what they lost by the act of Venezuela in dispossessing them. What was this loss? Clearly not the guano deposit on the islands. The islands were not theirs, and the guano was a part of the freehold, as much so as gold or coal, or any other valuable deposit.

The claimants were of the opinion that the islands belonged to New Granada, and had succeeded partially in obtaining a lease from that Government when further negotiations were broken off by the unfortunate occurrences at Panama.

This shows conclusively that, notwithstanding the hoisting of the United States flag and the claim of territory, the claimants did not consider that they had established title to the islands. The Philadelphia parties, on the other hand, were disposed to render homage to Venezuela as the titular lord of these possessions, and, as the result proved, were wiser than the Boston parties. But neither supposed that the mere fact of taking possession would vest an absolute title,

good against the world. The guano will have to follow the ownership of the islands, and as to this, the claimants not orly show no title in themselves, but admit and recognize a title in another party. The fact is, they recognized the title of Venezuela, because they sub-leased the deposits from her lessees. It is said they were compelled to do so or lose the profit of their investment. That may be true, but their position now as parties to an international reclamation would have been much stronger if, instead of recognizing the validity of the lease to the Philadelphia company and selling out to them in effect, they had stubbornly stood on their rights and demanded indemnity for the wrong done them.

They were to pay an export duty of five dollars and an additional sum of like amount as a royalty for the privilege of taking the guano for fifteen months, and at the end of this period, in consideration of this franchise, were to transfer the plant and "all materials used," as the contract reads, to the Philadelphia company. They were not compelled to make this bargain, and yet it is difficult to see what other arrangement could have been made without a total sacrifice of the plant, as long as Venezuela held it for the purpose of aiding the lessees in consummating the agreement made with her. The testimony as to the value of this plant is very loose and unsatisfactory. We do not know of what it consisted and have no precise statement as to items and original cost. It was used a year before it was seized, and we cannot tell, therefore, how much it deteriorated or what the value of the renewals, if any, was, or anything about it, except in the opinion of several of the witnesses it was worth $20,000.

It was worked under the protection of the Philadelphia contract for a year or more at least. That is the inference we draw from the provisions of the contract before cited.

It is true that there is a conflict of testimony as to the actual date when the islands were taken possession of by the Venezuelan authorities. According to some of the witnesses this took place in July, 1855, but Mr. Gowen himself says

that it was on the 1st of December following. If this is to be accepted as the date it would seem that the plant, machinery, &c., were in the possession of these authorities at the time the Philadelphia contract was consummated, and it is reasonable to infer were surrendered shortly afterwards to the owners to be worked in accordance with the provisions of that contract. The papers in the case are silent upon this point and we are left altogether to inference. The seizure, in our opinion, was unjustifiable, and the subsequent detention, for whatever length of time, contributed to the injury. Under these circumstances and in view of the fact that the transfer of the plant to the Philadelphia company was in the nature of a forced sale, which under the circumstances was a substantial appropriation of the property, we are not inclined to hold the claimants to the strictest proof of its value.

We will allow on this account the sum of $20,000. The claim for false freights cannot be allowed.

According to Mr. Gowen's own deposition the vessels on whose account this claim was made, were chartered long after he received notice from the consul of Venezuela at Philadelphia, that the Monks Islands belonged to Venezuela and that she would prevent any one trespassing upon her possessions. This notice had such an effect upon him that he ordered the schooner *Adrian*, then at the port of Baltimore, and about to discharge a valuable cargo, to sail for Liverpool and discharge her cargo there, although the Liverpool market was not a good one for this commodity, and in point of fact the sale at that port resulted in a loss of several thousands of dollars to the claimants. This it seems happened not only in the case of the *Adrian* but of several other vessels chartered by the claimants, all of which for fear of condemnation on proceedings to be taken in this country were ordered to some foreign port. If, notwithstanding this notice, the claimants undertook to charter vessels which were forced to return empty, we cannot see that they have just cause for complaint.

If Venezuela had, in the first instance, warned them against landing upon the islands under a claim of jurisdiction, and they had notwithstanding the warning proceeded to land and to erect their plant and take out guano, we hardly think that this element of their claim which we have already allowed, would have been entitled to favorable consideration.

The act of the United States of the 18th of August, 1856, providing for the acquisition of islands of this kind by its citizens, makes the fact of the non-exercise of jurisdiction by any other power one of the conditions of acquisition.

Notice then by Venezuela that she claimed jurisdiction, followed up by the requisite proceedings to enforce the claim, would have put the claimants in the wrong, had they attempted to take possession of the islands, notwithstanding this claim.

It is just because there was no claim made by any one to vacant sterile rocks, lying far out to sea, and by their very situation and appearance suggesting that they were no man's land, that we think the claimants have an equity to be reimbursed for their outlay in taking possession of what was apparently derelict and abandoned property. But the same line of reasoning must necessarily exclude the claim for false freights.

On the whole, we think justice will be done by allowing $20,000, gold coin of the United States of America. We make no allowance for interest owing to the imperfection and obscurity of the proof with reference to the value of the plant.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 32.

[August 15, 1890.]

LITTLE, for the Commission:

This claim, allowed by the former Commission and $35,000 awarded thereon, is founded upon an alleged denial of justice. The gist of the charge is a refusal of a Venezuelan court, in 1859–'67, to hear a cause duly instituted therein by the original claimant, Seth Driggs, a citizen of the United States, against certain citizens of Venezuela. If there was such denial, Driggs' representatives have cause for complaint here, without regard to the actual merits of the original case. The right to a fair and expeditious trial of his action, irrespective of merits (of course these could only be ascertained by trial), was one guaranteed by the public law. Nevertheless the character of the case is not to be laid out of view. A mere technical denial of justice is one thing, and a denial involving substantial interests in controversy, another. Adopting the reverse course from that pursued by counsel for the claimant, we shall first briefly consider the original case as to its merits.

The claim of Driggs in the original action was, that in 1829, he being a merchant in Trinidad, loaned to Gen. Santiago Mariño, of Venezuela, then, it would seem, on a visit to that island, three sums of money for which he received the General's three several obligations in writing, bearing interest at 10 per cent. "until fully paid," to wit: one for 1,000*l.*, dated August 25; one for 200*l.*, dated September 20; and one for 847*l.*, 10*s.* (including 97*l.*, 10*s.* commission), dated September 27, 1829. There was no date fixed for payment, and no security given further than, as

alleged, "Mariño agreed solemnly to satisfy his said obligations in said colony of Trinidad immediately after his arrival at La Guayra," and "bound his person and his property in the most solemn manner for the payment," he "agreeing to satisfy all disbursements, costs, damages, and prejudices that might accrue by any delay in the remission."

To recover the amount of these alleged notes and damages Driggs filed a complaint against the widow and heirs of Mariño in the circuit court at Caracas, and caused process to issue April 14, 1856. The defence would appear to have been, as gathered from the evidence in the papers sent us (for the pleadings entire are not among them), a denial of the facts alleged in the complaint, also *res judicata*.

The case was tried in 1859, and judgment rendered against Driggs, who appealed it to the Superior Court in which the alleged denial of justice took place.

A careful examination of the record convinces us the judgment of the circuit court was clearly right. The same obliquity and perversity of conduct, strongly suggesting mental derangement with a certain crude invention and cunning which marked the claimant's course in cases Nos. 10 and 14, recently disposed of, is manifest here. He seemed possessed of the idea that courts were controlled by forms and ceremony; that they were sorts of legalized snares in the hands of the artful to entrap the unwary. To him a profusion of seals and attestations of high functionaries formed for the litigant an armor offensive and defensive of the most effective character. To question the contents of a document bearing the name of a high officer copiously attested, he took to be a reflection upon the officer himself and an assault upon justice. Thus in his appeal, complaining that the Court of First Instance had disregarded his alleged North American affidavits, first taken and afterwards ratified before the judges of the highest courts of New York, Canada, Maine, and Massachusetts, and authenticated as to signatures by governors, mayors, notaries public, &c., he says:

"Without a single proof the judge has formed an erroneous opinion, impugning the reputation of the judges and magistrates of the most respectable character in the United States and Canada. With similar opinions expressed all justice must be paralyzed."

There had been monetary transactions between Driggs and Mariño which had long before been settled. They had no relation to the origin of this suit, unless possibly to stimulate a disordered mind to invention.

Driggs had sued Mariño at Maracai, in 1852. Just what the nature of the claim there was, is not fully disclosed. It would seem, however, from his own testimony, the suit was not founded on these notes.

On a charge, fully supported, as we believed in No. 10, of personating in that case two of the alleged witnesses used in this one, he was prosecuted by Mariño, and finally sentenced to two years' imprisonment. While in prison Mariño died. Discharged in 1854, Driggs began the preparation of this case. To suppose, in the light of the record, the case was other than an invention, and a crude invention at that, would involve an intolerable strain upon credulity.

The story of the loans, to begin with, bears the impress of improbability.

Why should Mariño borrow $10,000 at Trinidad so near his own home, when he had ample means at his command? For he was to return the money immediately on his arrival at La Guayra, a short sail away. Why would he pay 5 per cent. commission on a mere temporary accommodation under such circumstances? Why the solemn pledging of his person and property, and agreement to pay damages, costs, and expenses of collection, if it was the understanding and expectation that the money was to be immediately returned?

At that time Driggs had, as the story runs, at least five clerks in confidential relations with him, namely: James Smith, John Davis, Robert Taylor, James Charlotte, and John Williams. Smith had a general charge and intimate knowledge of all Driggs' affairs; Davis was outside collect-

ing clerk; Taylor, "cash keeper;" Charlotte, general collecting clerk, and Williams, a clerk simply.

A house thus manned, it would naturally be expected, would conduct a large business. Its clerks could not long retain in recollection the details of particular transactions. That they should all be knowing to any particular engagement is, of course, possible; but that they should all happen to be present at three successive transactions of the same character, at different dates, with the same individual, no body, unless a Mixed Commission, should ever be asked to believe. We are called on, however, to contemplate not only that this occurred, but that 26 years afterwards each one testifying, about the same time, at widely different points, recollected and stated in the same order, and almost in the same identical language, every minutia of each loan, giving amounts to the shilling, dates, rates of interest, when payment was to be made and where, what was to happen should there be failure of payment, &c., &c. And all this from roving witnesses at that, without fixed habitations, known antecedents or present acquaintances; now in one part of the world and now in another. There was one marked peculiarity about Driggs' "witnesses:" They never died and never forgot. They were proof against the perils of the sea and the ravages of the land; and no matter how old the case (for the same ones figured in several cases), their recollection was as fresh and clear as the morning air.

The notes having been thus evolved, the task of the inventor was to dispose of them. Failure of production at the trial must be conclusively explained. A shipwreck was resorted to. This was humanely conceived as cast, for it involved no harrowing incidents: not a life was lost, nor a human being injured. It was projected in this wise: A Mr. Goodier was engaged, in 1832, to go to Maracai, where Mariño was, to collect the notes. The ever faithful and ubiquitous James Smith accompanied him. Why James was along may be gleaned as the story unfolds. The General was

visited at his home by the Trinidadian messengers, and the object of their mission made known to him. The notes were exhibited, but the General, at that particular juncture, was not burdened with a surplus. He could only respond with regrets.

Returning, Goodier and his companion took passage at La Guayra on a "British packet" for St. Thomas. This was some time in November. The date is not given, nor is the name of the packet or its master. Particulars might have wrought an inconvenience, and they were unnecessary. Why they should sail for St. Thomas instead of Trinidad direct, is not disguised, perhaps, in true artistic style. Of course the former was the route to take. It was the most likely one for a shipwreck; and besides, there was another reason, as will just now appear, for its selection. No incident occurred, it seems, worthy of record till St. Thomas was reached. On touching the shore of that island, and at the very spot of contact, there, as luck would have it, was the old clerk, Charlotte! He had that very year gone to this part of the West Indies to live. Smith happened to go ashore, and met him. The two hastened to the ship—for her stop was but for a few minutes—and found Goodier writing at the table in the cabin, who, by some singular chance, bethought himself to show Charlotte the three notes, saying, "Here I have some of your old friends." Charlotte, to quote from his alleged affidavit,

"Took the said three obligations in his hands and read them and recognized his own signature attached to them as attesting witness, returned the obligations to Mr. Goodier, *who put them in his trunk.* At that moment the captain came on board and ordered the anchor hoisted, and deponent went on shore."

What then happened the same "deponent" tells:

"The next day the said captain, crew, and passengers arrived in another vessel at St. Thomas, saying the packet was lost in the night, and they saved themselves by swimming to a rock; and nothing was saved but the clothes they had on, and Goodier purchased clothes on credit."

On this interesting theme James Smith, as "deponent," says:

"The said packet was wrecked and went to the bottom before the boat could be hoisted out. All on board swam to a rock, and were taken off the following day by a vessel bound to St. Thomas. By this disaster all the obligations of General Mariño, and those of other persons were lost with the trunk of Mr. Goodier."

They were swimmers, that ship-load were—men, women, and children. What is more and equally fortunate, they knew and had the presence of mind, amid the dashing waves of the stormy deep in the darkness of night, not to forget where the rock was to swim to.

It will be observed that neither the date of the disaster, nor the name of the rescuing vessel, or that of its master, is given. But James couldn't be expected to look after everything. It was quite enough in that moment of supreme struggle for life to observe that the packet "went to the bottom before the boat could be hoisted."

Thus endeth the second chapter with the notes safely in the bottom of the sea. There can be no mistake about this.

We have the chief confidential clerk, who was familiar from the beginning with the notes, along when the wreck took place. He knew they were in the trunk. He saw them put there just as the vessel left the shore for the last time; and he knew the packet "went to the bottom" with the trunk and notes in it. This was ocular demonstration. Charlotte, a subscribing witness to the notes, had them in his hands, recognized his own signature, and saw them put in Goodier's trunk just in time to go ashore before the vessel pulled out on her last and fatal run. He knew also that Goodier could not have had them on his person, for the attorney seems the only passenger who did not save "the clothes he had on." He bought himself a suit "on credit" on reaching St. Thomas next day. No opportunity there to preserve the notes even if they had been taken from the trunk after leaving port and put in his pocket. Thus is settled the fate of the notes. It was not strange that Goodier,

being a lawyer, was compelled to buy "on credit," if he bought at all. But it was rather odd, it must be admitted, that he was the only passenger who was entirely stripped. How fortunate for Driggs it was, that the two witnesses above all others best qualified to identify the obligations should have happened at the right places by the merest of chances just at the right moment to bear conclusive testimony to their destruction!

Now, that the notes were made and destroyed, the next problem was to secure their recognition and acknowledgment by Mariño. Although Driggs was born unto trouble as the sparks fly upward, the fates were not always against him—when he was in their management! The desired occasion soon transpired under circumstances that made the proof easy and irrefragable.

It occurred at the house of Gen. Bermudez, in the city of Cumana, on the first day of September, 1835, there being present Driggs, Mariño, and four other persons. Bermudez does not seem to have been at home. It was not important that he should be. The business could just as well be done in his absence. These were war times, and this the field of conflict. Mariño was at the head of an insurgent army. But it so happened—good luck to Driggs—that his old faithful clerks, Smith, Davis, and Taylor, were in the city on that day, impelled hence, it may be imagined, by patriotic impulses. But that is not material. The important thing was to be there on that day. And there they were, no matter how or what for. What occurred, let the last-named "deponent" relate:

"That on or about the first day of September, 1835, deponent being at Cumana, he, together with James Smith and John Davis, accompanied Mr. Driggs to the residence of General Mariño, and found the General, who was in company with José Ma. Otero Guerra. Mr. Driggs made a demand on the General for the import of the three obligations granted by him to Mr. Driggs in Trinidad, in the year 1829, as aforesaid, indicating the amount of each and the sum of two thousand and forty-seven pounds, ten shillings. The General replied that the debt was just, and that he regretted having kept Mr. Driggs out of his money so long; that owing to the state of the

country, being in revolution, it was out of his power, but that he would satisfy Mr. Driggs and the interest accrued, at his earliest convenience."

It was very thoughtful to name the exact amount of each note to the General, and the place and year of the loans. For he might have failed to remember the debt which had caused him such regrets on Driggs' account.

The "deponents," Smith and Davis, tell exactly the same story, the former fixing the day with certainty on September first by the fact that he then left the city for Carúpano.

True the defence established, beyond any question whatever, that Mariño was not at Cumana September first, and had not been there, but was then fully four days' march away and heading in the opposite direction. But what of it? That circumstance pertains merely to the proof. It has naught to do with the organization of the case. We will not stop to inquire as to the probability of such an occurrence at the headquarters of a general in the face and in daily conflict with the enemy, had not the trivial circumstance of his absence existed. That pertains to the proof also.

The framework of the case being now developed, namely, the execution and delivery of the notes for money loaned, their loss at sea, and their subsequent acknowledgment and ratification by Mariño, it only remained to prove it.

Driggs procured, *ex parte*, an order from "The Tribunal of the parish of Candelaria," July 31, 1854, shortly after his release from prison, as follows:

"As he who represents only aspires or aims to avail himself of the testimony of Mr. James Smith, a resident of the United States, directs his petition, with certain accompaniments, to one of the competent judges of New York, to take the declaration he requires and to deliver the results to the party in interest to whom these actuations are delivered by the judge commissioned, *it being understood that in case the witness is not found in that State, to extend the commission to the place where he may be found.*"

This order seems to have been without warrant of law, but no matter. There followed the alleged affidavits of the five alleged clerks present at the execution of the notes, to wit: Smith's, taken, according to the record, before a judge of the

Supreme Court at Albany, July 2; Davis', before a judge of the Superior Court at Montreal, July 5; Taylor's, before a United States district judge at Portland, July 7; Charlotte's, before a United States district judge at Boston, July 10, and Williams', before a judge of the Common Pleas, New York, July 21, 1855. It would seem from these dates that Driggs began at Albany and went the rounds to New York, arriving in the latter city, however, as early as July 14, as appears from papers in the case of the brig *Fanny*, No. 7. The signatures of the judges are profusely, and sometimes, singularly attested. The originals are not here, and we only have the purported copies to go by. The name of the officiating judge at Montreal is James Smith. His signature is attested by James Smith, notary public, and the notary's signature is certified to by the acting mayor of Montreal. In Maine, under date of July 7, the clerk of the supreme judicial court certifies "that a certain *documento* is on file in my office, in words and figures following; that is to say," &c. Then follows what purports to be a copy of Taylor's affidavit, taken on the same day before the United States district judge. The judge's signature is certified to by the United States district clerk, under the seal of the court. This is followed by a certificate of the clerk of the supreme judicial court, attesting the signatures of the United States district judge and clerk; and this again by the certificate of one of the supreme judges of the State, attesting the signature of the clerk of the supreme judicial court, and stating—what for is one of the conundrums—that he is the proper officer "to make out and certify copies of all records and proceedings of the supreme judicial court." How "Taylor's" affidavit, pertaining to matters wholly in Venezuela, should be among the files of the supreme judicial court of Maine, is only one among many queries which this record excites.

There are many peculiarities in these documents that arrest attention. The Montreal affidavit begins thus: "Before me, the *Honorable* James Smith, one of the judges of the supe-

rior court for Lower Canada, at Montreal, personally appeared John Davis," &c. The affidavits are all in the same style. The events are described in the same order and almost in the same language, often identical terms being employed. As before stated every minutia is detailed in positive terms.

There is a notable thing about the ages of the alleged witnesses: Williams is described, 1855, as "upwards of 50"; Charlotte, 52; Taylor, 53; Smith, 54; and Davis, 55. All of which is natural enough considering the five to be of the same family, and Driggs' imagination as their common parent. Each is a merchant, yet in no instance is his place of business given, not even as to the city or State.

One having closely examined this record, can readily understand why, on an application for the ratification or retaking of these affidavits, which had been found not supported "by full proof," the attorney for the defendants asked, as was done, that the letters rogatory to the American judges be sent through official channels; that the officiating judges be requested to fix the day and hour for the taking of the testimony in each case that there might be opportunity for cross-examination, and "that the same judges be requested to allow daguerreotype likenesses of each witness to be taken to be appended to the proceedings, certifying to their resemblance and affixing thereto the seal used by them."

The order for "ratification" was entered April 25, 1857. It contemplated the fixing of the time for taking the depositions as prayed by the defence and gave authority "to make the necessary inquiry at the cost of the defendants with a view to prove their (witnesses') identity." All was to be done in four months.

Under this order, as is inferred, though no reference is made to it in the proceedings had, the "ratifications" occurred. They consisted simply of new affidavits by the same "deponents" confirmatory of the old ones. They were taken before judges of the same courts at the same places,

and authenticated in the same way, for the most part, as on the former occasion. No day appears to have been fixed for their taking, nor was any attempt made at identification. Daguerreotypes were not used! Claimant may have been a strict constructionist of the second commandment. It is written: For the Jews require a sign and the Greeks seek after wisdom. But Driggs was no Jew. Neither, it may be added, was he a Greek. Wisdom was not what he was after.

Manifestly some person, Driggs himself in all probability, went the rounds as in 1855, taking the affidavits and arranging the authentications in course. The dates show this, and they run so close together that there could have been no fixing of days as was contemplated in the order. He commenced this time at the city of New York and ended at Boston. The taking was as follows:

Williams, New York, June 30; Smith, Albany, July 7; Davis, Montreal, July 9; Taylor, Portland, July 13; and Charlotte, Boston, July 14, 1857. It cannot escape observation that these alleged witnesses, wanderers on the face of the earth, so unstable that Driggs in 1852 could not ascertain the whereabouts of two of them when his liberty depended upon procuring their testimony, were in the exact places in 1857 where they were severally found two years before, so that on a flying trip by rail they could be brought before the same judges or judges of the same courts without the loss of a single hour. Nor will it fail to be noticed that, after the exposure of the personation which sent Driggs to prison in 1852, and the demand, such as was made for identification, when the ratifications were to occur, no attempt whatever was made in that direction by Driggs. This was confession in itself, or would have been on the hypothesis of sanity.

Other matters might be noted showing the fraudulent character of this original claim against the widow and heirs of Mariño; and other conclusive defences pointed out against it. But it is unnecessary. There is no room to

doubt that the claim set up was manufactured *in toto*, and that the five witnesses, by whom he sought to establish it, were creatures of his disordered imagination. It may be possible the affidavits taken were in every instance actually executed by the officers indicated. If so, Driggs himself unquestionably pretended to be in each case the witness of the particular name. No other conclusion is it possible for us to reach.

Even on this state of fact the Superior Court had no right to refuse a trial, assuming (if that be possible) it advised in advance of hearing, of the character of the claim. A careful examination of the record fails to convince us it did so. The mere pendency of an action for seven years with repeated postponements and refusals to assign for trial is not enough to establish a denial of justice. Records could easily be filled with such refusals by inopportune applications. It must be affirmatively shown that such proceedings were unwarranted. Nothing appears here as to the condition of the business of that court during this period, or as to the sufficiency of the judicial force to discharge it. Nothing is shown as to the time usually required there to bring to hearing and final determination actions of this character. The presumptions, strong with us, in favor of the legality of the court's action are not rebutted. On the contrary there is much to support it. The defendants were numerous. Service was had with difficulty. During the pendency of the action death occurred among the defendants. New parties had to be made. Minors were involved, causing much delay. Sometimes delays were by the neglect of the parties made necessary through failure to give notices required by law, &c.

Driggs himself made dilatory motions, with the evident purpose of delay. At one time, as late as 1867, he noticed the assignment for trial was not posted on the door of the court, and he demanded that a summons *issue to himself* as plaintiff in that regard, and that the case be assigned "in the legal term after he had been summoned." (Record, p.

148.) The evidences of method in Driggs' protest against delays are not wanting. These began about the time the Culver treaty of '66 became a certainty, and increased till the final withdrawal of the action to place it before the former Commission.

Without further comment the claim is disallowed.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 7.

[August 15, 1890.]

LITTLE, for the Commission:

This demand is for $12,957.36, as of 1868, being Venezuela's portion (28½ per cent.) of a claim against Colombia originating in 1828. The former Commission allowed thereon $12,000.

It is averred, in brief, that Seth Driggs engaged in mercantile business in Trinidad, shipped from that island July 19, 1828, by the brig *Fanny*, 36,398 pounds of cocoa, worth at the point of destination 14 cents a pound, consigned to a house in St. Thomas; that the vessel was carried against a rock, the first day out, and disabled, and nearly filled with water, so that it became necessary to unload the cocoa on Colombian shores, and put back to Trinidad for repairs; that Colombian officers thereupon set up the claim that the cocoa being subject to export duty which had not been paid, became forfeited to the Government, because of the attempt to smuggle it away; that a litigation of nearly a year ensued on that question, which resulted in a decree against the Government and discharging the property from custody, and that meantime the cocoa was spoiled, it having been stored and kept in a damp place.

This claim was not brought to the attention of the Government of the United States until 1856. There are old letters among the papers from the American Chargé d'Affaires at Caracas to Driggs, about *a* claim of his against the Venezuelan Government, but not about this one. They related to the alleged seizure of some vessel, although a superficial glance—such is their general character—would lead one to suppose, because of their association, they pertained to this demand.

We should reject the claim upon the ground on which No. 36 was disallowed. Twenty-eight years had elapsed since the alleged wrong by the Colombian Government, and not a complaint had been made by Driggs! There is not a case on our list that better illustrates the wisdom of the prescriptive rule. The evidence is contradictory, and the actual witnesses to the essential transactions on the part of the Government had presumably passed away, for their evidence was not procured when the claim was asserted. Like No. 32, the claim is largely fictitious as to its support—time having furnished the opportunity for fraudulent engraftment. But unlike it there was a nucleus of fact, more or less direct and substantial, upon which to erect the superstructure of a claim. There would seem to have been at that time proceedings before Colombian customs officers relative to cocoa taken from a vessel by that name in distress on the coast of Colombia, and that Driggs was connected with them.

But as to the *bona fides* of this claim it would be quite enough to say, in view of case 32, that its strength depends upon the mythical testimony of Smith, Charlotte, and Williams The fourth witness, not improbably a myth also, aside from Driggs, is unimportant. Their alleged affidavits were obtained on Driggs' first round in 1855, sketched in that case. Those of "Smith" and "Charlotte" were respectively taken at the same time and before the same judges as then. That of "Williams" formed an exception in this respect. His was not taken on the same day, nor by the same judge, for reasons shortly to be noted. There is that same positive statement by all as to occurrences in different places on different dates, 27 years before, as though they had been united like the Siamese twins, and always at essential places, and of infallible memory, which characterized the other affidavits, and which puts indelibly the stamp of untruthfulness upon all of them. In the former case we had only copies of the affidavits. In this one the originals are on file, and are evidently genuine, so far as their official character is concerned.

A comparison of the signatures with Driggs' own writing leaves no doubt in our minds that he was the affiant in each case. They evince a poor attempt at disguise. To avoid writing more than necessary, he gives only the initial of the Christian name, thus: "J. Smith," "J. Charlotte," and "J. Williams." The affidavit of "Williams," in New York, was taken before Ingraham, common pleas judge, July 14, who also took his affidavit, July 21, in the Mariño case (32). But Driggs made his own affidavit in his own name in this case, July 16. Having appeared as "Williams," before Ingraham, it would not now do to appear before him as Driggs. He therefore went before another judge. Judge Cowels, of the Supreme Court, took his affidavit in his own name.

That Driggs could have supposed, as he manifestly did, that any tribunal would be influenced in his favor by the character of the crude and impossible "evidence" he was so palpably, almost in open view, fabricating, is an unmistakable evidence of insanity. His place in 1852 was not the prison but the asylum.

We have been unable to find good ground for the support of this claim in the official proceedings before the customs officers, even if it were otherwise unobjectionable.

It is disallowed.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } No. 13.

[August 15, 1890.]

LITTLE, for the Commission:

The essential facts of this case are set out in the body of the following protest, found among the papers transmitted us, to wit:

UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, } ss:
Bristol, }

NEW BEDFORD.

"By the public instrument of protest, be it known to all whom it doth or may concern, that on this nineteenth day of June in the year of our Lord one thousand eight hundred and forty-six, before me, William H. Taylor, a notary public, duly commissioned and sworn under the authority of said Commonwealth, and dwelling at New Bedford aforesaid, personally appeared George H. Dexter, late master of the ship *Nassau*, of New Bedford, who, being by me duly sworn according to law, did declare and say, that on the 3d day of January last past, he, the said Dexter, sailed with the ship *Nassau* aforesaid from the port of New Bedford, bound on a whaling voyage in the Atlantic and Pacific oceans and elsewhere. That nothing of importance occurred until his arrival at Cumana on or about the second day of March, 1846. That on his arrival at that port he was informed that he might obtain liberty from the Government of Venezuela to carry on the whale fishery in the Gulf of Cariaco and adjacent seas, by first taking from the proper authorities a license for such fishery. That by the assistance of Mr. Seth Driggs, a citizen of the United States, residing at the said port of Cumaná, he accordingly obtained two official documents, dated March 6, 1846, giving him liberty to take whales in the Gulf of Cariaco for the space of three months, and having paid therefor the sum of one hundred and twenty-five dollars, he proceeded to a suitable anchorage and commenced capturing whales. That after having taken three whales he received a notification from the governor of Cumaná, that he would be required to desist from the fishery or to convey the carcases of the whales he might capture to a distance of at least thirty-five miles from the ship. That he represented to the governor the impossibility of complying with this new condition as it would render his license entirely valueless to him to do so. That immediately thereafter the collector of Cumaná demanded of him the payment of certain port charges amounting to about three hundred and seventy-one dollars, which charges having now for the first time heard of, he declined paying, believing that it was an illegal attempt to extort money from him. That shortly afterwards an officer was sent on board his ship with instructions to remain on board at an expense of three dollars a day, chargeable to the said ship, until the demand for the payment of port charges was complied with. That being now convinced that it would be useless for him to continue to carry on his business in the said Gulf of Cariaco in face of the new and vexatious demands that were made upon him, he determined to surrender the license and depart to some other place, where he could pursue his business without further interruption or molestation. That he accordingly proceeded in his boat to Cumaná, and there proposed to the collector to return the license, paying for the time he had availed himself of the privileges granted by it, and requested that his register, crew-list, and other ship's papers, which had been left at the custom-house when he took the said license, might be

restored to him. That the collector refused to restore the said papers until the port charges were paid, and, he the said Dexter, having been advised that the demand for such charges was unauthorized by law, the *Nassau* not having broken bulk or discharged any part of her cargo, he determined to depart at once without paying them. That in consequence of the detention of his ship papers as aforesaid, he was compelled to abandon the voyage and return to the United States. That he accordingly repaired immediately on board his ship and caused her to be got underway, and on the 17th day of May she arrived at the port of New Bedford, and further the deponent saith not.

"GEO. H. DEXTER."

The claim for damages arising from the premises was presented to the Government of the United States for its interposition by Jirah Perry, of New Bedford, Mass., the owner of the vessel, July 18, 1846.

Though his heirs, he being deceased, have not appeared before us, their claim is fully set forth in the papers transmitted, has been presented and argued by counsel for the United States, and comes within the treaty.

The principal question involved is, whether the collector at Cumaná was authorized by the laws of Venezuela to collect of the master the duty charges exacted in addition to his license fee. These charges were demanded as upon export products, the claim being that whales taken in Venezuelan waters were products of Venezuela within the meaning of their revenue laws, and that the council of government had ordered export charges to be collected in such cases.

If they were legal the retention of the schooner's papers till paid would not seem to have been unreasonable.

Without entering upon a discussion of the resolutions and laws cited by the Minister of Foreign Affairs, in support of the charges demanded, in his letter of Nov. 11, 1846, to the American Minister at Caracas, we will content ourselves by saying that a careful examination of them and of the law of May 3, 1839, relative to port duties, in force at the time, convinces us that the charges should not have been made; and therefore the retention of the ship's papers was illegal. And this seems to have been the view of the courts at Cumaná.

For Seth Driggs, who had become responsible for the *Nassau's* port obligations, was sued on account of such unpaid charges, and the courts decided in his favor.

On the question of damages, we regard the showing made as too speculative in character to form a just measure. It is not a case for punitive damages. The error was no doubt committed by the collector, in doing what he believed to be his duty, and without a purpose to wrong any one. What would fairly make the owner whole should be allowed. We think $1,000 with 5 per cent. interest from the date of complaint to the United States will do that. There was involved only about a month's loss of time to the vessel, and that sum would be over her average monthly earnings, on the estimate furnished by the original claimant. The entry may therefore be for $1,000 with 5 per cent. interest from July 18, 1846, to Sept. 2, 1890, inclusive, in favor of the heirs of Jirah Perry, deceased, or, if he was not the full owner, to the owners of the *Nassau* at that date whoever they may have been.

This case stands in the name of Seth Driggs, because he presented it for the heirs of Perry before the old Commission. He never had other connection with it. The proofs were all furnished to the United States by Perry himself in 1846.

Claim of

JOSÉ CASTEL
v.
THE UNITED STATES OF VENEZUELA. } *No.* 26.

[August 15, 1890.]

LITTLE, for the Commission:

Neutral property in a belligerent's territory shares the fate of war the same as that of subjects or citizens. If injured or destroyed in battle or siege, in the absence of cir-

cumstances evincing wantonness or culpable neglect on the part of the government within whose jurisdiction it is, the public law furnishes the owner no redress against such government. The case is not altered if the owner happens to be an officer of a neutral power.

The house and contents of José Castel, who is represented to have been a citizen of the United States and its consul at Puerto Cabello, were injured in battle, or siege with fighting through several days, between the Federal and Government forces, near the close of the Venezuelan civil war, in 1863.

We find nothing in the evidence sent us to justify the finding of the old Commission that the loss of a part of the effects "might and should have been avoided," in any such sense as to create a liability against Venezuela. No such claim was made by Castel. There does not appear, and it is not claimed, that there was wanton, or avoidable injury done. The line, however, between what is avoidable and what not, occurring during an engagement, if such be ever discernible, we would not undertake to draw. There is no showing of injury before or after the conflict.

The claim, which is for $3,863.75, as of 1868, and on which the sum of $2,000 was before awarded, is disallowed.

We have reached this conclusion upon the hypothesis that Castel was, as represented, a citizen of the United States and its consul. It is doubtful, however, whether he ever was such citizen. Three of his witnesses speak of him as a French subject; and the records in the State Department show he was only acting vice-consul of the United States, which he might have been, although a Frenchman as to citizenship.

Claim of

HOLLINS & MCBLAIR
v.
THE UNITED STATES OF VENEZUELA. } *No.* 4.

[August 15, 1890.]

By the Commission:

The motion to change the style of this case and conform it to the names of the real claimants here, is overruled. Such changes might cause confusion and would result in no good. We have preserved the old styles, save as to numbers, as the most convenient means of designation. By doing so, however, nothing whatever is to be inferred as to who are actual claimants.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 40.

[August 15, 1890.]

By the Commission:

This claim is for a denial of justice, the amount demanded in that behalf being, as of 1868, $7,029.27.

The complaint sets forth that the original claimant, Seth Driggs, some time, date not given, instituted an action before the "Ecclesiastical Tribunal of Cumana," against Dionisio Centeno, priest of Rio Caribe, to recover $1,000 loaned the defendant in 1833, with 12 per cent. interest. The case appears to have been dismissed in 1851, because Driggs failed to comply with the order of court to give security for costs. He differed with the court as to the legality of such an order. It is enough to say he should have sought his remedy, if wronged, in the superior tribunals, and having failed to do so, he has none here. (No. 39, p. 128.) The claim is disallowed.

Claim of

OLIVER TAYLOR
v.
THE UNITED STATES OF VENEZUELA. } *No.* 8.

[August 19, 1890.]

By the Commission:

This claim is set forth in the report of Señor Villafañe, the Venezuelan member of the former Commission, to his Government, as follows:

"This case arises out of the seizure and confiscation by the custom-house of Maracaibo in 1839 of fifty barrels of flour belonging to the claimant. The reason why such a thing was done was because no mention was made of said flour in the coastwise permit (*guia de cabotage*), which was given at La Guayra to the vessel *Fenix*, which had imported it there, and which brought it to Maracaibo. Proof was given thereafter that the said flour had been carried to the port last named, with proper permission of the custom-house authorities of La Guayra, and that the omission in the permit was only due to oversight or forgetfulness (*un olvido*) on the part of the collector of customs of the port of La Guayra. The Executive Power could not but recognize the truths of the facts as stated, and acknowledged that it was bound to make a proper indemnification, whereupon it applied to the Legislative Power and asked for its consent to that payment.

"The matter remained in suspension for many years, until at last, through repeated recommendations of the Executive made at the urgent solicitation of the U. S. Legation here, both Houses of Congress approved, in 1865, a report which had been submitted to them, appropriating $1,302.63 to pay for the flour, and the transportation thereof from La Guayra, the commission fees, and interest at 6 per cent. per annum from 1839 to 1848. The report sets forth that no interest was to be paid for the sixteen years subsequent.

"We, the Commissioners, were of the opinion that if interest was allowed during a portion of the time it was also to be allowed during the balance of the said time, and that this allowance was much the more just and necessary, as it appeared that the money, after all, was never paid. It will be paid now, and not cash, but in ten instalments, as provided by the treaty.

"In the discussion of this case the question was raised whether the indemnity should be paid in our money or in the money of North America. I maintained with warmth the former view, and Mr. Talmage, although very reluctantly, assented to it. The main argument on which he rested to hold an opinion different from mine was substantially the same which Mr. Culver had

made in his note to our Government, to wit, that the treaty had used the word 'dollars.'

"Therefore the award made was to the amount of $2,317.70, covering the capital, interests, &c., and interest in 29 years at six per centum per annum. Upon due conversion of that sum into American money it became reduced to $1,742.63."

The evidence, in our judgment, substantially supports the conclusions arrived at. The claim is therefore allowed.

The entry may be for 1,132 *pesos*, with 6 per cent. interest from August 1, 1839, the date of the wrong complained of, to September 2, 1890, inclusive, expressed in gold coin of the United States, counting 75 cents to the *peso*, deducting whatever sums have already been paid on account of the said claim by Venezuela in satisfaction of the former award.

Claim of

SETH DRIGGS
v.
THE UNITED STATES OF VENEZUELA. } *No.* 11.

[August 19, 1890.]

LITTLE, for the Commission :

After Seth Driggs' discharge from prison, in 1854, he went at once extensively and systematically into the claim business on his own account, as disclosed by his cases already disposed of. Referring to the false imprisonment claim (No. 10) in one of his letters (1855) to the Venezuelan authorities among the papers in the case, he says :

"This [is one] with divers other international claims which have been for years accumulating until the cup of grievous wrongs is full to overflow, and the day of retribution is at hand."

His mind had not been idle during confinement. His plans seem to have been then matured. Among the "divers" claims was, in part at least, this one. It is for an alleged balance due on certain notes (number and amounts not given) and orders put forth by or on the custom-houses of Cumaná and La Guayra, obtained by him in due course of business, as he claimed. A part originated in 1848 and a part in 1857–58.

With that fatality incident to all his "claims" pretty much, the notes and orders themselves had passed by fraud or other means from his possession, and he was compelled to rely upon oral testimony (in this case upon his own) to account for them. Of the Cumaná notes, which he says were endorsed to him by the custom-house there for money which he advanced the Government to pay its troops in the revolution of 1848, "when the treasury was empty" (the amount

advanced not being given), he says in his letter to the Treasury Department at Caracas, January 1, 1855:

"The notes were not paid at maturity, and the Executive Government directed the collector of Cumaná should receive said obligations and pay me. I handed them with one hand to the Adriana [custom-house] with a view to procure my money with the other, but was grievously disappointed: for asking for my money I was informed that the amount was put to my credit. * * * This was an act of violence, fraud, and injustice on the part of the officials of this government."

He says the balance on account of these notes (they having been largely paid) was, October 4, 1859, including interest, $505.25, "since which time not one cent has been paid." This balance is said to have been represented by a couple of Treasury orders, aggregating $372.75, issued him on liquidation, in 1857.

As to the part of the claim originating in 1857, it is asserted in one of his unverified and uncorroborated "statements" among the papers, that one Furlong in that year performed some work on the Government house at Caracas and received therefor, in 1859, three orders on the Treasury for $2,000 each, payable in February, March, and April, respectively, 1860.

"Against this credit," says the statement, "Furlong gave an order in favor of Driggs for $1,000 in payment of the cash advanced to furnish the Government House, which order the Secretary of the Treasury admitted, and gave an order on the Treasury in favor of Driggs for $1,000, against the credit of Furlong, whose last payment fell due the 30th of April, 1860."

Driggs, in the letter to the Government, of January 1, 1855, referred to, says:

"I, a citizen of the United States, have been deprived of my just rights, and have been persecuted and neglected like a beggar in the streets to suffer and beg for my daily subsistence, or die like a dog."

And in one to the American Minister, in February following, urging intercession in his behalf in this case, he concludes with this language:

"I want $600 immediately and $2,000 by the first of April, to leave the country on special business" [to secure the 'evidence' against the Government in cases disposed of]; "the balance can remain over for six months. All my business is and must continue paralyzed until I receive at least $600."

Venezuela paid him nothing meantime; yet he had $1,000 to advance "for the use of the Government" in 1857, against which he was maturing and preparing claims amounting to hundreds of thousands of dollars for its wrongs towards him, "for which there must come a day of retribution!"

He says that through Minister Culver, a liquidation of "these credits," including a "liquidated claim," 1858, of $505.20, was had before the "Board of Liquidation" at Caracas in 1864; but the board refused to allow interest. The "statement" then proceeds:

"The present claim is not either for a salary or a pension" [he had included in one of his accounts an item as due himself of $800, on account of the Clark pension—see case No. 19,] "but for money advanced in good faith for the use of the Government, and orders given by the Secretary of the Treasury on the Public Treasurer for the payment, which orders were disallowed, *but withheld from the person in whose favor they were drawn;* and the idea of not paying interest under the circumstances is preposterous."

Thus we have the claim founded upon obligations issued by the Government, but in possession of its disbursing officers, without a scratch in the hands of the owner to show the non-payment! We do not stop to point out the improbabilities of the case upon Driggs' own statements;—to inquire, for instance, whether the Secretary of the Treasury would issue an order for $1,000 against Furlong's "credit," when there were three outstanding orders covering it. There are other sufficient grounds for the disposition of the claim.

The former Commission allowed him $1,808, including interest on the $3,264.70 demanded. The allowance was approved by the Umpire, and thought to be due by the Venezuelan Commissioner, "from," as he said, "the documents shown by the claimant." What they were we of course can only infer by what have been transmitted us.

When it is stated that the "documents" we have in support of this claim, so far as they tend in that direction, consist of letters and "statements" of Driggs himself, including his petition under oath and his sworn protest in 1854 as to the Cumaná notes, we need scarcely say, in view of the developments in his cases already decided, that such "documents" are, in our judgment, unsatisfactory and insufficient, aside from the inherent improbability of their material and important averments.

Even had he been trustworthy, most of the documents would have to be excluded from consideration. For the most part they consist of letters or alleged copies of letters which he wrote, or claimed to have written, to the Secretary of State, the American Minister and Chargé d'Affaires at Caracas, and the Venezuelan Government, at various times from 1851 to 1866. These were but his own declarations, and he was himself before the former Commission. Such letters, offered by himself or in his favor, are not evidence against the Venezuelan Government. It was not bound to take notice of his communications to it; much less to those addressed to his own Government had there been unofficial notice of them, and nothing is to be inferred against it for failure to do so. What the rule might be, had the letters gone to it through the official channels of the United States, and remained unanswered, it is not necessary to inquire, for there is no intimation that such in any instance was the case. Could this method of establishing claims against a government prevail, the strongest nations would not long be secure against bankruptcy.

Among the *expediente* is the draft of a letter by Driggs in his own hand which, in 1866, he desired the new American Minister, Mr. Wilson, to embody, or rather to adopt, in a despatch to the Venezuelan Government.

We give it *in hæc verba*, omitting accompanying "statement," taking the liberty, however, to emphasize some passages, as a specimen of the "documents" used in support of

this claim, and as indicating the claimant's methods touching the support of his "divers international claims." It reads:

To the Honorable RAFIEL SEIJERS,

Secretary of State for Foreign Relations.

CARACAS, *October*, 1866.

The undersigned, Minister Resident of the United States of America, has the honor to call the attention of the Honorable Minister of Foreign Relations to the following statement filed in the Legation of the United States by Mr. Seth Driggs, a citizen thereof.

[Here follows the statement.]

By the foregoing statement, *and the records of this Legation*, it appears Mr. Driggs has from time to time advanced money for the benefit of the Government of Venezuela; in 1848, in Cumaná, to sustain the troops; in 1857 to repair the Artillery Barracks, and also repair and embellish the Government House, paper its walls and furnish matting for its floors, for the payment of which the Secretary of the Treasury gave orders on the Public Treasury, which orders were dishonored by the Treasurer; and after all other means were tried to obtain his payment for the money so advanced, Mr Driggs was obliged to have recourse to the Minister of his country for his intervention; *but no respect it appears has been paid to the applications of that functionary, showing an utter disregard by the Government of Venezuela to do justice to a citizen of the United States*, who generously advanced his money for the benefit of this Government, and *it is evident* the time lost and expenses incurred in making voyages from Cumaná to Caracas, and from Caracas to La Guayra, and the multitude of applications to this Government amounted to more than the original amount claimed, *and whilst a citizen of the United States has been thus unjustly dealt with, and kept out of his money, tens of millions of dollars have been distributed to citizens of Venezuela*, and the withholding of the insignificant sum of three thousand dollars from Mr. Driggs under the circumstances *is an unwarrantable piece of injustice which can no longer be submitted to with impunity.*

A liquidation of these claims were made on the 24th February, 1864, by the Board of Liquidators. Under instruction from the Secretary of the Treasury, the claims were all admitted by the Board, but they disallow interest on the orders of the Secretary of the Treasury on the Public Treasury because no stipulation was contained therein to pay interest. When the orders were given it was presumed they would be paid on presentation, consequently there was no occasion to stipulate for the payment of interest, the orders being dishonored, from that moment interest accrued. This is the practice in all civilized nations; the fault was not on the part of the holder of the orders but on the part of the payee, *and it would be an act of dishonor on the*

part of Venezuela for a moment to decline paying interest on money lent after the great forbearance on the part of the lender.

Why argue about the existence of a debt if already liquidated and acknowledged by the Government and orders for its payment issued?

We have regarded the claimant's conduct in other cases as indicating mental derangement. The presumption here displayed, and the assumption that a dispatch manifestly so untruthful and otherwise so grossly improper could be procured from the American legation, are another evidence of mental and moral infirmity.

The claim is disallowed.

Claim of

LEONARDO PECK
v.
THE UNITED STATES OF VENEZUELA. } *No.* 45.

[August 21, 1890.]

LITTLE, for the Commission:

Leonardo Peck, a citizen of the United States, lived the greater part of his life at Maturin, Venezuela. There he accumulated property and raised a family. His children, however, were born out of wedlock. They and their mother were natives of Venezuela, never having been in the United States so far as appears. While on a visit to his old home at Syracuse, New York, he died, October 31, 1860. It seems he left a will, though the paper sent us purporting to be its translation and probate, is of a very unsatisfactory character. It has incongruities of date, and is apparently fragmentary. We do not feel justified in basing any property rights upon it.

The claim is for stock taken from Peck's farms near Maturin, by military forces in 1859, 1860, and 1861, and is asserted by the executor of his will and also by his two sons. The total value of the stock taken, including interest, was asserted to be, in 1864, 23,181.75 pesos.

This was supported by the depositions of twelve witnesses examined in the presence of and cross-examined by a representative of the government, who fully corroborated the statements of the executor, Fabricio Aponte, to the effect that the property named was taken at the times indicated from the farms (*sitios*) of Peck by the military forces of the Government, and that it was worth as to all the animals the price stated.

Señor Esteves, of the Department of Pubic Credit, allowed, Sept. 28, 1864, the entire amount of this claim, except

as to interest, to wit: 18,545.50 pesos. The interest was excluded by the act, as stated by him, under which the application for allowance was made.

The value of the property taken before Peck's death was 12,450.50 pesos. This was all that was due him, and all, therefore, that passed to his legal representative as such. The rest of the claim pertained to his children and their mother, and cannot be considered by us. For they were not citizens of the United States, and have, consequently, no standing here under the treaty.

Under the holding in the Willett case, No. 21, the executor is entitled, as the legal representative of Peck, to claim here the amount due his testate, he having presented the claim to the American legation at Caracas for its intercession as early as 1864.

We think the interest should begin at the date of allowance by the Venezuelan Government, September 28, 1864, as prior interest seems to have been prohibited by law, and very reasonably so. A government in such cases may not, for obvious reasons, be required to pay interest while such a claim is withheld.

The entry may, therefore, be for 12,450.50 pesos, with 5 per cent. interest from Sept. 28, 1864, to Sept. 2, 1890, inclusive, less payments already made, expressed in gold coin of the United States, counting the peso at 75 cents.

Claim of

WILLIAM S. MILLER
v.
THE UNITED STATES OF VENEZUELA. } *No.* 23.

[August 26, 1890.]

LITTLE, for the Commission:

This claim is for an alleged denial of justice in the failure of Venezuela to prosecute and punish one Louis Malinsini, a resident of Caracas, for assaulting and wounding the claimant, a citizen of the United States, in that city, April 27, 1864. The assault is described as a most brutal and unprovoked one, because of which, and the fear of further injury from the assailant, the claimant was obliged to sacrifice "a profitable business" and "make his escape in a private manner" to the United States.

The complaint was filed before the former Commission by Seth Driggs, attorney-in-fact for Miller. He furnished the proof by his own affidavit and that of one Loreta Brion, described as a "resident of this city, fifty years of age, occupation that of her sex, not comprehended within the exceptions of the law either with W. S. Miller, and least with Louis Malinsini." Nothing further is revealed as to her, aside from the character of her evidence. We know something more of Driggs, however. His own cases are a sort of autobiography.

There is no other testimony before us pertaining to this claim, except the diplomatic correspondence, which evidently was founded upon information most likely promoted by Driggs. Like his other cases this one has marked peculiarities. Miller himself did not testify. According to Driggs' account the assault, most dastardly and fiendish in character, leaving the victim wounded and covered with blood and unable to be taken to his own house for a week, occurred on the public streets of Caracas in the presence of a number of persons in the broad light of day. Yet in that little city of 50,000 peo-

ple, the first information the American Minister had of the tragic event was five days after from a letter by Miller, dated April 30, two days before its receipt, the body of which is in Driggs' handwriting; the would-be assassin meantime stalking the streets unmolested, breathing murderous threats against Miller, and only waiting and watching for an opportunity to carry them into execution. And it would seem the Minister of the Department for Foreign Affairs obtained his first information of it through the American Legation by Mr. Culver's note of May 2d or 13th.

Driggs says complaint was at once lodged before the proper authorities and the police. But it would appear from a report of the Committee on Foreign Affairs, 41st Cong., 2d Session, No. 79, that the prosecution instituted by Miller against Malinsini was a civil one for damages, April 30, 1864 (p. 43, *et seq.*), in which he demanded a recovery of 10,050 *pesos*.

Under the law of Venezuela, he or any other person could have filed a complaint and caused the arrest and trial of the assailant; but that seems not to have been done. The complaint was made to the American Minister. The payment of money was the form in which it was desired punishment should be inflicted upon Malinsini and—Venezuela.

On the 13th of May, 1864, the claimant's counsel, Foster, appeared in court with a power of attorney, to "sustain his rights before the competent tribunals in the judicial business that may arise, and *also in the extra-judicial*." (rep., p. 44.) This latter power is supposed to refer to the prosecution of an international claim thus early contemplated, and of which the foundation was laid in the letter to Mr. Culver of April 30, the day the civil action was brought.

Miller, within a month after the assault, left the country for the United States, never again to return, Driggs (see rep., p. 47) sailing at or about the same time.

In this connection Mr. Culver, who seems to have been under the impression that a just ground of complaint existed in behalf of Miller against the Venezuelan authorities, in his letter to the Secretary of State, December 16, 1865, says:

"About the time [May 18] of the receipt of this note, or soon thereafter, Miller became very impatient and even boisterous because I would not threaten the Government more sharply and bully its tribunals; and with the *aid and prompting of intermeddling outsiders*, he became so impertinent and insulting that communication between us was suspended. But my efforts in his behalf were in no degree abated by his abuse, nor did I consider my duty lessened.

"He soon after left the country, alleging, as I understand, two reasons therefor: first, that he could not with safety to his person longer continue his business; second, that he was going home to procure my removal from office for not causing justice to be done in this case. * * * His business was a very limited and insignificant one; and, probably, at the time of the injury his whole stock in trade, at a fair cash value, would not have exceeded one hundred and fifty or two hundred dollars."

On the 16th of October, 1865, Miller addressed a memorial to the Secretary of State from New York, setting forth his grievances in this matter, and praying an indemnity against the Venezuelan Government on account of a denial of justice, etc. He estimated his losses for the breaking up of his business at $10,000. It was in response to a letter of the Secretary of State inclosing this memorial, that Mr. Culver sent the note quoted from. Comparing the memorial, a copy of which is in the *expediente*, with the letter of April 30, 1864, one sees it is manifestly the composition of Driggs, who had procured in New York, four days before its date, Miller's power of attorney "to institute an international claim for the recovery of the indemnity or damages * * * suffered in consequence of the violence committed" by Malinsini, and "to present a claim before any joint commission for settling claims of citizens of the United States against Venezuela in my (Miller's) name, and to receive all amounts awarded to be paid by said Commission, and give receipts for the same." The Culver treaty of 1866 was not then promulgated, but that it would be was well understood, as indeed was the case, perhaps, in 1864.

This international claim was now fully launched in true Driggs fashion. There is no further need of Miller, and he drops out of view, and is heard of no more.

Eliminate the two affidavits referred to and the claim stands unsupported. That of Driggs is, with us, self-eliminated. We could predicate nothing upon it. Brion's is so manifestly

his own procurement that it stands but little better. It is contradictory to her testimony before the court in the civil case (rep., p. 49). He has her state that Malinsini drew a long knife from a sheath and attempted to stab Miller with it. Before the court she said, she being "a little distant," could not tell whether he had a knife or an iron in his hand.

He makes her corroborate his statements to the effect that Malinsini walked up and down the street before the house where Miller remained for a few days after the assault, threatening the latter's life. Before the court she said she knew nothing about that, etc., etc.

We can put no reliance in this proof; and the claim, on which the sum of $12,000 was before allowed, is rejected.

[August 26, 1890.]

By the Commission:

Article 9 of the treaty was originally intended to protect innocent holders of certificates issued by the Old Commission, without respect to the character of the claims on which they were based. Such holders, having paid full value for them, were to be paid by Venezuela in full, although the original claims might be found to be bad and disallowed in whole or in part.

This was modified by the supplemental convention, which in effect so altered its meaning as to provide that such holders should not be paid unless the claims on which their certificates were respectively based should be allowed, and then only *pro rata* to the extent of the allowance where that was but partial. Awards may be made and certificates issued accordingly; the original certificates being surrendered or accounted for on the receipt of the new ones.

In any case of conflict or doubt as to the persons entitled to the certificate or certificates we are of opinion and so decide that it will be in substantial compliance with the treaty to issue a certificate in such case to a particular person, or particular persons to hold in trust for those concerned as their interests may appear or be lawfully determined.

Claim of

HENRY WOODRUFF, AND FLANNAGAN, BRADLEY, CLARK & CO.
v.
THE UNITED STATES OF VENEZUELA.

Nos. 20, 25.

[August 26, 1890.]

FINDLAY, for the Commission:

These cases were consolidated at the argument, and will be disposed of together. It appears that Messrs. Flannagan and Clark, citizens of the United States, in association with Messrs. Rojas and Marcano, citizens of Venezuela, on the 10th of January, 1859, received a concession from the Government of that country, for the construction of a railroad from Caracas to Petare, with the privilege of extending it to Guarenas and Guatire. The Government bound itself to subscribe for 500 shares of the capital stock of the par value of 100 *pesos* per share, and to pay half of the subscription, 25,000 *pesos*, when the materials necessary for the construction of the road were landed in Venezuela, and the other half when the road was completed to Petare.

In addition to this it also made a land grant of about 8,000 acres, upon the condition that it was to be uncultivated and located within the province of Caracas. The projectors were authorized to fix the capital stock at a final limit of $400,000 for that part of the line between Caracas and Petare, with a right to increase this amount, in case they availed themselves of the privilege of extending the road further.

All the materials necessary for the construction and equipment of the road were to be received into the country free of duty. The work of construction was to be begun and completed within a year, with an allowance for unavoidable delay. Directors, employés, and laborers were exempted

from military duty in time of peace, except what is termed "doctrinal exercises." The franchise was made exclusive for the term of thirty-five (35) years, and many other matters of detail, usually found in such instruments and not necessary to notice, were set out at great length in the concession. It was provided, however, in the 20th Article that all doubts and controversies arising under, and everything relating to the concession, should be adjudicated and determined by the courts of Venezuela in the usual course of judicial proceedings, and should never, or any decision thereon, be made a subject of international reclamation.

Shortly after the execution of this contract, Flannagan and Clark entered into a separate agreement with their associates, Rojas and Marcano, who were to do part of the work, for the purpose of furnishing the requisite material for the construction of the road, and other parties were subsequently let in to this contract for the purpose of supplying the financial aid and engineering skill necessary to make the enterprise a success. As a result of the whole combination, men and materials were shipped to Venezuela from this country and England, including rolling stock. The line was surveyed, located, and graded in part, and generally advanced to such a stage of completion that Mr. Flannagan says only thirty thousand dollars would have been required to put it in running order as far as Petare.

A locomotive weighing eighteen tons, a first-class passenger car, a second-class passenger car, six box cars, four platform cars, a hand-car, six hundred and sixty tons of iron rails, chains, frogs, spikes, switches, were all ready in the country and waiting to be used when the project came to an end in the following manner:

The contractors being entitled to 25,000 pesos from Venezuela when these materials were landed, requested payment and were refused; but as the contract for the iron rails had been made in England in part on the faith of this sum being promptly paid, they were without the means of keeping

their engagement, and consequently could not get possession of the rails. Besides this difficulty they were prevented from landing the rails and subjected to heavy bills for demurrages on account of the temporary occupancy of La Guayra by insurgents.

Owing to the troubled condition of the times and the pressure of military necessity, under which the men and implements employed by them in the construction of the road were frequently impressed into the service of the army, the railroad supplies and equipment before mentioned were compelled to lie at La Guayra exposed to the weather, until the condition of the contractors became so desperate that they proposed to the Government either to buy out their interest in the enterprise, or let them send their materials back to the United States, and Venezuela pay them for the loss. Both of these propositions were declined, when finally being in an ugly strait, and seeing no other way of escape, it is claimed that they were forced to sell out all their interest in the enterprise and materials of every kind to their Venezuelan associates, Rojas and Marcano, and to accept in payment ninety thousand of the bonds of the railway company of the East for $1,000 each, bearing interest at 9 per cent., and secured by a first mortgage on the road, the franchise, and all its appurtenants.

As the consignee of the iron rails demanded payment of what was due on them, and as the cash could not be produced, it was a part of this negotiation that thirty-five of the bonds should be left with him as security for this debt. This left fifty-five of the bonds remaining, but according to Mr. Flannagan, who is endeavoring to account for the presentation of only forty-six as the basis of the present claim as made by Mr. Woodruff, the other nine went into the pockets of Rojas and Marcano. After this purchase, it seems that these gentlemen, by what is called a deed of cession, transferred all their rights in the enterprise, original and acquired, to the Venezuelan Government, which, it is claimed,

annulled all outstanding stock subscriptions, its own included, and proceeded, as we understand, to construct and to operate the road, but on this point the record is very cloudy and obscure.

Subsequently, however, it sold the concern to one Arthur Clark, an Englishman, for the sum of $80,000, to be paid in bonds to that amount, representing the public debt of Venezuela, and afterwards on an alleged failure by Clark to execute his part of the contract, by judicial proceedings had the sale annulled and the *status quo* restored.

This is, in brief, a history of the case, necessarily meagre and imperfect, owing to the absence of papers which have been called for by the Commission and not furnished, and also for the want of proofs which the claimants have not felt bound to furnish in support of the case as they have made it on the pleadings.

From this partial and incomplete sketch, however, it would appear with reasonable certainty that the projectors of this scheme, in addition to the capital stock which they were authorized to issue, put out bonds for $90,000 in the name of the Railway of the East.

It would appear from the reply of the Minister of the Fomento to the note of the Minister of Foreign Relations, with respect to this transaction, under date of January, 1865, that these bonds were issued by the concern for the payment of the supplies before mentioned, and for the indebtedness which Rojas and Marcano had incurred under the construction contract before referred to, between them and Flannagan and Clark. Having regard to the fact that these last-named parties were to receive under this contract, in payment for the work done and material supplied by them, a majority of the 4,000 shares of the capital stock, besides money, as the work progressed, and that their associates, Rojas and Marcano, were only to receive 944 shares, it is impossible to believe that these bonds were issued without the authority and consent of Flannagan and Clark, and as they were issued

for the purpose of reimbursing them for their outlay, according to the Minister, or for their interest in the enterprise according to Mr. Flannagan, or for their interest in the materials according to the mortgage, in either or any event there is no presumption to be made in favor of the fairness or the *bona fides* of the transaction. On the contrary, the rule as laid down by the Supreme Court in the case cited by the learned counsel for the claimants, is the other way; for while the relations of a party towards a corporation or joint stock company as a director or officer, will not preclude him from entering into contracts with it, or from making loans or taking its bonds as collateral security, yet still courts of equity will refuse to lend their aid to the enforcement of such contracts unless satisfied affirmatively that the transaction was entered into in good faith with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit. (Richardson *v.* Green, 133 U. S., p. 30.)

It may be that the ninety bonds of a thousand dollars U. S. currency each, in this case, at 9 per cent. interest, represented the actual value of the thing, whatever it was, for which they were given in exchange, and no more, but there is no evidence of that fact, and, basing presumption upon, human conduct in like circumstances, there is a strong probability that the parties to this transaction, both Venezuelans and North Americans, made a very liberal estimate as to the value of their possessions. If this is not true, it is at least incredible that a minority of the prospective shareholders should have forced the majority into accepting for their interest the bonds of the company without their approval or consent, and yet a color has been given to this case, indeed, the allegation of Flannagan, Bradley, Clark & Co. is, that they sold out to Rojas and Marcano on these terms. as the best they could do.

It is to be noticed here, too, that the petitions in this case aver that 46 of the bonds were issued to the claimants,

by name, payable to bearer, whereas it would appear by other statements, made in the papers, that the whole issue of 90 had been turned over to them, originally, in payment of their interest in the materials, and so the mortgage recites ; but taking what the Minister of Fomento says, in connection with the context of the case, we are inclined to the belief that thirty-five of the bonds were issued as security for the payment of the iron rails, and the other nine passed into the hands of Rojas and Marcano, in satisfaction of their claims against the concern. In other words, when the enterprise was about going to pieces, the original projectors and concessionaries, who had never been incorporated, but who were acting simply as an association of individuals, issued bonds in the name of the Railway of the East, secured by a first mortgage, for the purpose of indemnifying themselves for the expense they had incurred, and to pay what was due on an outstanding bill for some 660 tons of railroad iron.

The claim of Flannagan, Bradley, Clark & Co., as presented to the old Commission, was rested, and is now rested, upon the distinct ground that Venezuela had violated the terms of the concession by her failure to pay her subscription, and especially by the interruption of the work caused by her military operations.

There was no claim on their part that she was bound to redeem these bonds which constitute the foundation of the claim of Mr. Henry Woodruff, to whom they appear to have been sold in part, and transferred in part, in trust, for the benefit of the original holders, their representatives or assigns.

Their claim is for the value of the unissued stock at par, the amount of Venezuela's subscription, and some other items not necessary to notice, on which whole sum they allow a credit of $96,000 on a valuation of 90 bonds at that figure.

It must be apparent to every one that the claim, based on the par value of stock not yet issued, and only to be issued in accordance with the terms of the construction contract,

when the line was completed to Petare, is purely visionary. How much of this road was built when the North American associates parted company with it, nowhere appears.

The counsel of the claimants, who was there himself in 1864, gave us no information upon this point, but quote an extract from Eastwick, an English writer on the Loan of 1864, to show that there was about half a mile of the railroad built at that time, all covered with grass and weeds. But it would seem from scattered statements throughout the *expediente*, that the Government itself had done some work on the road after the retrocession or assignment by Rojas and Marcano and by a recital in the Arthur Clark contract, a copy of which is produced by claimants and filed, it is alleged that Venezuela had spent $80,000 on the enterprise. This contract is dated the 28th of April, 1864, and if the recital is true, and it may be taken as true as against the parties who have filed the paper for the purpose of showing what Clarke agreed to pay for the road, then it follows that this expenditure must have been made after the original projectors had ceased work, and that consequently with this aid from the Government, together with all the work previously put on it, it had only been constructed a half mile in four years.

What the character of the work was, or the engineering difficulties in the way, we have no means of ascertaining from the record, but making every reasonable allowance for even unusual obstacles, fifty thousand dollars a mile ought to be a pretty fair estimate, and that would allow twenty-five thousand for the half mile actually constructed and in running order. How much was graded beyond this point, or to what stage of completion the road-bed had been advanced, the record does not show, except the testimony of Mr. Flannagan, before referred to, that it would only have required $30,000 to complete it. But there is enough in the case to satisfy us that proof might very easily have been taken as to the actual condition of the physical structure of this road

in the summer of 1860, and what its condition was in 1864; and we can see no reason why an estimate, approximately correct at least, might not have been made as to the value of the locomotive, rolling stock, and the railroad supplies, which appear to have been furnished for its use, and which were sold to Rojas and Marcano for the bonds in controversy.

Whatever may have been the value of these things it is very clear that the stock, particularly after the issue of the bonds, must have been valueless. The country was in a state of civil tumult and insurrection. The very iron required to lay the road was forced to remain on shipboard in the harbor of La Guayra because the insurgents had possession of the town and refused to allow it to be landed. The laborers on the road were impressed into the military service, their picks, shovels, and working implements seized and appropriated for a similar use, and these and like interruptions brought the enterprise to a standstill. On the top of all this the contractors fasten a mortgage upon the concern to secure $90,000 in bonds, bearing 9 per cent. interest, on a road which certainly had not more than half a mile completed, and which was the possessor of one locomotive, two passenger cars, one first-class and one second-class car, six box and four platform cars, one hand car, a lot of railroad supplies of no great value, and 660 tons of forty-pound rail, held by the consignee for debt, and all these materials yet to be hauled to Caracas from La Guayra. If what is called the stock, but which in fact was nothing but a right to have the stock, when the road was completed, was worth anything under these circumstances we fail to perceive it. There was an undoubted right to have Venezuela's subscription for the 25,000 pesos. This was to be paid when the above-mentioned materials were brought into the country, and there can be no doubt whatever, that that condition had been fully satisfied.

But Venezuela was simply unable to pay. Her finances, owing to the revolution, were in a disordered condition, and

projects which had been designed in time of peace, and which could only be successfully conducted under pacific conditions, naturally and inevitably fell into decay and ruin under the wasting stress of civil war. The same stern necessity which forced her to seize the laborers and implements, to throw up fortifications instead of making railroad embankments, compelled her to violate her contract to pay the stock subscription. There is nothing in the record to show that her dereliction in this behalf was designed to injure the claimant or was anything else than the involuntary and inevitable consequence of her unfortunate situation. It will be remembered that Flannagan, Bradley, Clark & Co. abandoned the enterprise in the summer of 1860. It was not until 1863, three years afterwards, that Venezuela, then in a more settled condition, received from Rojas and Marcano a transfer of the enterprise, which during the interval or shortly afterwards appears to have taken on its coat of grass and weeds, described by Eastwick. The question was asked at argument why the sale was made to these parties and the suggestion rather than the answer, was, because they being natives and in active co-operation and sympathy with the Government, contrived to take advantage of their foreign associates with the ulterior purpose of vesting the title to the enterprise in the Government. But there is clearly on the facts stated no warrant for such a suggestion. On the contrary, it is quite clear to us that Rojas and Marcano, after carrying the enterprise for three years and being unable to do anything with it, transferred it to the Government at a time when brighter prospects seemed opening up for Venezuela under the auspices of the Federation.

At the same time, while all this is true, we are not prepared to say, other things being equal, that the claimants had not a good and valid claim for this subscription money. The contract was explicit, that on the landing of sufficient materials in the country for the construction of the road, Venezuela would pay over the one-half of the sum she had subscribed to the

capital stock of the concern. The other half was to be paid on the completion of the road, and, of course, as to it we do not recognize the validity of the claim. But as to the 25,000 pesos, one-half of the subscription, there was undoubtedly a good title in the claimants. But how was it to be enforced?

The concession or charter was granted on the distinct condition, as clearly expressed as language could make it, that nothing relative to it or any decision upon matters growing out of it, should ever be made the subject of an international reclamation; but on the contrary, all doubts and controversies of whatever kind affecting the agreement, should be referred to the judicial tribunals of Venezuela, and be there determined in the ordinary course of the law.

The failure to pay the stock subscription, in our opinion, was a clear violation of the terms of the concession, but it is equally clear that Venezuela, either from experience or forecast, realized the importance of referring all questions which might arise in the prosecution of the enterprise, to the jurisdiction of her own tribunals, and expressly excluded them from the sphere of international reclamations.

Nothing could be clearer more comprehensive or specific than the language of the concession upon this point. Even when such questions were transferred for adjudication by her courts, such was her anxiety to avoid any possible international entanglement, that she resorted to the doubtful expedient, perhaps, of providing that the decision of her courts should not be drawn in question by foreign intervention. Whether a decision so made in palpable violation of the rights of the parties could be allowed to stand, on a claim of denial of justice, is a question not necessary for the decision of this case, but we should think it more than doubtful; but the insertion of such a provision shows how solicitous she was to withdraw the concession, and the questions which might arise under it from every possible cognizance and jurisdiction except her own. This she certainly had a right to do, and the concessionaries, if we may adopt that term,

had an equal right to decline the concession on such terms. When they made their contract they knew exactly what they were doing and with whom they were contracting. They knew that Venezuela had been in a constant state of war and civil commotion, almost from her birth, and they knew that a reference of questions, in which they were interested, to the courts of that country, sitting in the midst of such confusion and anarchy, might mean practically a failure to have the questions adjudicated at all, or the risk of an adverse decision, prompted by prejudice or partisanship. But in spite of all this they agreed that their whole case, whatever it might be, growing out of the concession, should be finally disposed of by the domestic tribunals of that country.

Have they any standing before this Commission? A majority of its members answered this question in the negative in the case of Beales, Nobles, and Garrison, and they have learned nothing since which induces them to think that they were wrong in that conclusion.

We have no right to make a contract which the parties themselves did not make, and we would be surely doing so, if we undertook to make that the subject of an international claim, to be adjudicated by this Commission, in spite of their own voluntary undertaking, that it was never to be made such, and should be determined in the municipal tribunals of the country with respect to which the controversy arose. Had the claimants resorted to the courts of Venezuela for relief, and been refused in a case clearly showing that there was a denial of justice, a difficult question, as before observed, would have been presented as to how far a Commission of this kind could afford redress, when the claimants had not only submitted themselves to the exclusive jurisdiction of another tribunal, but had also agreed that any decision of that tribunal should not be made the basis or occasion of an international claim. In point of fact no effort appears to have been made to invoke the aid of the Venezuelan courts, but the claimants made their ap-

peal directly to the Executive Department of the Government. Whatever may have been the practical outcome of a resort to the courts for assistance, however abortive such an attempt may have proved, we have no right to assume the folly or futility of such a course, in the face of the solemn stipulation of the parties, that they would look to that quarter for relief, and no other. It is to be presumed that they would not have made such a stipulation if the laws and courts of Venezuela were helpless in affording them a remedy; but whether they were or not, so they made their bed and so they must lie in it.

The seizure of the facilities for the construction of the works, and the appropriation of the same for military use, was one of the necessary and unavoidable incidents connected with a struggle for self-preservation, which the law has everywhere recognized as the sovereign right of the State. No claim is made here for the use of the men and things so taken, and which appear to have been restored when the exigency, under stress of which the appropriation was made, had passed away, but the whole theory of the claim is cast upon the assumption that Venezuela, by this spoliation and the failure to pay her stock subscription, had caused an entire failure of the enterprise, and ought to pay all the damage which ensued.

Recurring to the concession, if it be said, as it has been said before, that Venezuela has waived her right to have questions arising under it determined by her own courts, and has submitted herself to the jurisdiction of this tribunal by the terms of the convention of 1885, we can only repeat that there is no evidence of such an intention; that no inference of this kind can be drawn from the general submission of "all claims;" that these where contractual in their nature necessarily come before us in the textual form in which the agreement has been embodied, and that when we look to that and see that jurisdiction is not only not given but expressly denied, we should be breaking the contract instead

of enforcing it, if we adopted any other construction. The claim of Flannagan, Bradley, Clark & Co., therefore, must be denied. The other claim of Henry Woodruff stands upon a somewhat different footing, but different more by reason of the peculiar environment out of which it arose, than the principles by which it is to be determined. It is in fact the other claim somewhat reduced and in a different form.

The forty-six bonds on which it is founded were issued to the first-named claimants ; and except as to the unmentioned number, either held by Mr. Woodruff in his own right, or by his pledgees if there are any, are vested in trust in that gentleman for the benefit of Flannagan, Bradley, Clark & Co., and they in their own statement of claim allow the whole number of bonds originally issued as a credit to Venezuela, as if they in some way controlled, or could control, the bondholders.

It seems to us, or a majority of the Commission, that these bonds, conceding for the present the regularity of their creation and issue as the obligations of a lawfully constituted body corporate, and that this corporate body was merged in the sovereignty of Venezuela, with the legal consequences of that merger as claimed, must neverthless be treated, as raising questions relative to the concession, and must be disposed of by the tribunals of Venezuela. By the terms of the concession there was no authority granted to mortgage the enterprise as security for the bonds, but admitting that this passed as a necessary incident to the grant, without which the road could not have been built, yet, still, whether as an expressed or implied power, it must trace its origin to the concession.

So proceedings for a foreclosure or a sale would necessarily have been founded on the mortgage which was fastened upon an enterprise *quasi* corporate in its character, and emanating directly from the concession.

As we construe the 20th article of this instrument, it was the intention of Venezuela to prevent any claim of any kind,

directly or remotely connected with the construction of this road, ever passing beyond the reach and control of her own municipal cognizance; and, in this view, it would be strange indeed if the obligations of the concern, which could only be enforced without such a provision in the domestic tribunals of the country, were not intended to be included.

Nothing short of a bill in equity and an accounting could give relief in this case, and the exercise of such powers is quite beyond any jurisdiction conferred upon the Commission.

But passing this for the present let us examine into the origin of these bonds with a little more minuteness than we have previously given the subject, and first we will premise a word or two about the so-called stock subscriptions.

According to the resolution passed through the Department of the Fomento on the 3d of December, 1864, the subscribers to the stock were as follows:

Government, 500 shares; several Venezuelan citizens, 67 shares; foreigners, 98 shares; the Government of the old Province of Caracas, 50 shares; and the Municipal Council of Petare 14 shares. This would make a total of 729 shares, and the remainder appears to have been divided between the members of the construction company before referred to, composed of Flannagan and Clark and Rojas and Marcano, in the division of which the North Americans, in consideration of the heavier work they had agreed to perform, were to receive 2,196 shares, which, of course, constituted a majority. No shares appear to have been actually issued, but the construction company, which in effect represented the concessionaries, were to receive the proportion to which they were entitled on the completion of the road to Petare, and as the consideration for their outlay in its construction; in other words, they were to build the road and take its capital stock in payment.

The locomotive and railroad supplies, before referred to, having been shipped from the United States, and the iron

rails, which, at 40 pounds to the yard, would have been just enough to build nine miles of road, with the required sidings, having arrived from England, and the project brought to a halt, as before described, the prospective holders of this stock issued the bonds in question payable to themselves, and secured them by a mortgage on the franchise of the road and its property. Now, if we assume what has been so earnestly contended for by Mr. Woodruff, both in his capacity of counsel and claimant, and what, in fact, constitutes the foundation of his case—that the Railway of the East, in whose name the bonds were issued, was a corporate body in fact and in law, it would follow, of course, that this corporation would be under an obligation to pay the bonds; that the shareholders, to the extent of their stock subscriptions, irrespective of special laws regulating such matters, on broad principles of right and justice, would be bound for this indebtedness, and that besides, the bondholders would have the mortgage as collateral security for their protection.

But what would be the liability in such case of Flannagan, Bradley, Clark and Co., who, on this theory, must be considered as both bondholder and shareholder, and who do not appear to have transferred their stock to Rojas and Marcano? They were not to pay in money, but in services and materials, but these made themselves, or were to make themselves apparent, in the finished structure of the road and its equipments, and the security of the mortgage really depended upon the extent and character of this work. Stock, which was a debt of the corporation to the shareholder, was to be issued to them in payment for what they did in completing the road and long before this, when, so far as we can see, and then only after making the most liberal allowance possible under the circumstances, only a half mile had actually been built and ironed, these prospective stock creditors of the corporation convey away by mortgage all its assets to secure the payment to themselves of a lot of bonds, which, of course, constituted a first lien on the road, and in the order of priorities would have to be satisfied first.

It is claimed that Venezuela not only merged this corporation, swallowed it as the whale swallowed Jonah, without the ability to cast it up, but that in the act of doing so, destroyed all the outstanding stock subscriptions, her own included. If she did, it would be difficult to see why the obligation to build the road, which was in effect the stock subscriptions of the concessionaries, was not cancelled at the same time; and if this is so we cannot perceive what equity is raised in favor of the claimants by this transaction, because while it is true the capital stock may be regarded as the primary fund out of which the obligations of the corporation are to be paid, and that any diminution of this fund by a release of the subscriber, necessarily operates to the prejudice of the bondholder; nevertheless, this cannot be the consequence, when the stock subscriber and the bondholder are one and the same person.

Take the case of the pledgee of the thirty-five bonds, pledged as security for the payment of the money due on the consignment of the iron rails, and suppose that he had to enforce them against the corporation, could Flannagan, Bradley, Clark & Co. escape responsibility, as prospective shareholders. The other subscribers clearly could not, because they were to pay in money; but are these parties in equity to be treated as any less subscribers, because their contributions happen to be made in work and materials instead? The corporation if such existed, was manifestly composed of the different parties before mentioned, including the Government, as stockholders, and if the bondholders would have had the right to pursue the unpaid subscriptions as a fund, out of which their claims were to be satisfied, it is difficult to see upon what principle a discrimination could be made between the stockholders, and one class held, and the other released, and it would certainly be an aggravation of this injustice to relieve the majority, and only hold a very small minority. In the present case, it so happens that, if the bondholder pursued the stockholder to recover his debt,

he would only be chasing his own shadow; but this does not alter the equities of which we are speaking.

The claim is, that Venezuela impaired the rights granted under this concession by destroying the fund which was to be raised by subscriptions to the capital stock; that she in effect released all the subscribers from the obligation to pay the subscriptions, and that thereby the bondholder was seriously injured. We say in reply, that as the bondholder in this case was substantially the shareholder, and thereby debtor to himself, that we cannot, in this circumstance alone, perceive cause for any serious complaint. This reasoning of course would hold good whether the concessionaries ever had themselves incorporated or not, because as partners, or associates, in the prosecution of a joint enterprise, each would have been bound to the other and to the creditors of the concern to pay what he had agreed to contribute towards the common fund. In point of fact, after a careful reading of all the papers in the case, and giving the same effect to the copies filed as if they had been originals, or the copies had been duly authenticated, we not only cannot see any evidence that these parties had themselves incorporated, but on the contrary we think the evidence is entirely the other way. The fact of incorporation is not sought to be established by matter of record, but in pais by the admission of the Government in the resolution of the Fomento before mentioned. Shares of stock are there mentioned, constitution and by-laws are said to have been adopted, and then it is stated that a company was legally organized called the Railway of the East. Upon these and like expressions the argument has been built up that, whether a corporation *de jure* was formed or not, there was one in fact recognized by the Government, which dealt with it as an existing *bona fide* corporate body. On closer examination, however, of these admissions, and of this attempt to create a corporation by estoppel, it will be found that the case goes no further than the recognition of a company, called in the resolution itself,

"anonyma sociedad," which, from the account given of it by the Minister of the Fomento, would seem to be some kind of a joint-stock concern, the members of which were unknown, and under the laws of Venezuela were released from individual responsibility for its debts, for which the society was alone responsible, to the extent of its holdings.

But whatever may have been the nature of this society, it is perfectly clear to us, and has been so since the original argument was made in the matter, that the claimant is entirely wrong in the contention which he has waged with so much vigor and pertinacity, that there was a merger of this creature in the Government with the consequence of fastening upon it all the obligations of the concern.

Mr. Woodruff went to Venezuela in 1864 for the purpose of prosecuting this claim in person, and while there was informed of the contract made with Arthur Clark and which was consummated in the spring of the same year. He was notified also that whatever rights he had as a bondholder or as the representative of the bondholders, he should proceed to enforce against the road then in the hands of Clark; that Clark, as a condition of the concession, had assumed all its obligations, and besides, of necessity, must take the road subject to the mortgage which Woodruff held. Instead of taking this advice, or resorting to any legal steps to enforce his claim, either against Clark or under the mortgage, he assumes at the outset the position that Venezuela, by what we may call the Rojas-Marcano retrocession, had obliterated or rather merged the corporation, and in doing so had assumed the liability of paying the face value of his bonds, with accrued interest to date.

When the case was first argued, the Commission not then having an opportunity to study the papers, was under the impression that this retrocession had been effected in the summer of 1860, shortly afterwards or about the time when Flannagan, Bradley, Clark and Co. are said to have sold out their interest in the enterprise to Rojas and Marcano, but it

now appears that this transaction did not take place until the 19th of December, 1863.

From July, 1860, to this date, then, the road remained in the hands of Rojas and Marcano. During this period the Unionists, under Paez, and the Federalists, under Falcon, had fought out their battles, and, in the summer of 1863, Paez had abdicated, and the Federation was established. What was done with the road during this period does not appear, but it is more than probable that the same causes that interrupted its progress in the beginning continued to operate until peace was declared. For reasons which will be made apparent before we conclude, we are very much interested at this point in knowing whether the Government, as a part of the property turned over by Rojas and Marcano, received the locomotive and cars, and if so, in what condition; and also whether the remainder of the rails not put down were transferred, and in what condition; and also how much of the road was in a partial stage of completion, and in what condition; and how much on which there was no work done at all. The record furnishes us no evidence except what we have already cited upon these points, and the claimant, who appears to have staked his whole case upon the idea of a merger, has not in that view of his rights felt that it was necessary to supply any proofs himself. What was the nature of this retrocession? For aught that appears, or is suggested by the papers, it was no more than the surrender of a concession which the grantee was unable to carry out. That it was forced by Venezuela, or accomplished by trick or contrivance by the aid of the concessionaries, who would also appear to have been assignees of Flannagan, Bradley, Clark & Co., there is not a word of evidence in the record, either of suggestion or proof, and this insinuation made in argument must be treated as purely gratuitous. Rojas and Marcano evidently could not raise the funds to complete the road, and they turned it over to the Government under terms and conditions, and for a consideration, if any, of which we know nothing.

It is because we have no light on this point that we have expressed anxiety to be informed as to the condition and value of the original equipment and supplies which the Government received under this transfer. For while we think that this case will have to go off on a point of jurisdiction, and are very clear that Venezuela did not make herself responsible for the bonds in controversy, by the transfer from Rojas and Marcano, yet still, if there was reliable data on which to base an opinion, as to the value of the things for which the bonds were taken in exchange, and on which they constitute a first lien, we should have no hesitation in saying that there was an equity, which would entitle the claimant to be paid for use and occupation to the extent of the loss suffered before the things were transferred to Arthur Clark. At the same time it appears by recitals in the contract with this gentleman that the Government itself had expended $80,000 on the road, and there is evidence in the case that the iron rails were paid for in part at least by an order on the custom-house for customs export duties to the amount of $18,000. There is no evidence that Clark ever paid the $80,000 in public debt as he had agreed, and the fact that the concession to him was cancelled indicates the contrary, and if this is the case then the only advantage Venezuela would appear to have secured from the retrocession was the possession for a time of a half mile of an unfinished line of railroad, proposed to be nine miles in length, with a certain amount of equipment and with the means of further construction, for part of which she paid herself. If under these circumstances she put $80,000 on the road, which according to our view was still subject to the mortgage, it would seem that this sum ought to be more than a set-off as against what she might be held equitably charged for use and occupation during the short interval she was in possession, between the 19th of December, 1863, and the 28th of April, 1864, the date of the Clark contract, or during the period she may have held the road after the cancellation of that contract.

Venezuela had nothing more than an equity of redemption, and had any individual received the assignment it would never have been contended that he became personally liable for the debts of the concern. The whole theory of liability so laboriously erected in this case is founded, in our opinion, in an entire misconception of the legal notion and consequences of this transfer of the enterprise to the Government. The Government was or intended to be a stockholder, and failing to make its subscription good for the reasons stated, after the enterprise had languished and failed durding a period of revolutionary violence continued through three years, during which the original proprietors had failed to build the line, succeeded to whatever they had, and at the same time took possession of the fruits of their labor, all subject to a mortgage, however, which they had created. A six months' experiment demonstrated that the Government was not likely to make a success of the enterprise, and it was then turned over to Clark, under an agreement by which he bound himself to take care of its obligations; the Government, however, in the meantime having spent $80,000 on the enterprise. At this stage of the proceedings the claimant makes his appearance and insists that the corporation of the Railway of the East has become kenneled in the womb from which it issued, and as a consequence of that merger is liable for all the obligations of its offspring, when living a separate and independent existence. There is some little confusion in the presentation of this theory, for while it is clear enough that the responsibility of the Government is sought to be established on this ground, and this alone, there are other considerations introduced which serve to blur and in part destroy the simplicity of the original conception. For example, it is insisted that the Government cancelled the stock subscriptions, and in that way expunged the only fund to which the bondholder could look for the payment of his debt. It is also said that the withholding of the Government's own subscription caused the enterprise to fail, and so

the seizure of the working implements and the impressment of the laborers into the military service, are all artfully grouped for the purpose of reinforcing by equities what in its nature is a purely legal claim.

But in truth, according to the claimants' contention, whether these equities existed or not, the Government, by the simple act of merger in swallowing the so-called corporation, swallowed at the same time all its obligations, and is legally responsible for them. Venezuela neither issued nor indorsed the bonds in question. They were issued by the parties themselves, and unless business is done on different principles in Venezuela than in other parts of the world, we must believe that Flannagan, Bradley, Clark & Co., by virtue of the potential ownership of a majority of the stock, and their general relations to the enterprise under the construction contract, must have had an equal voice with their associates in the issue of the bonds. When they received them, at least, there could have been no pretence that Venezuela was responsible. Neither by the terms of the concession, nor by any contact or connection, direct or remote, express or implied, with the transaction has she assumed any responsibility.

Technically speaking, of course, there could be no such thing as the merger of a corporation in the sovereign power from which it emanated.

The Government by *scire facias* may destroy a legal corporation, or by *quo warranto* may dissolve a *de facto* corporate body claiming a legal organization, either for misuser or nonuser. A corporation may surrender its charter and on acceptance may in this way accomplish its civil death. Some of its integral parts may be lost, or it may be consolidated with some other corporation and be annihilated, but to speak of the merger of a corporation in the Government that created it is in our judgment to confound all permissible analogy. Merger arises when the conditions are not incompatible, and when the legal logic by which the result is worked out does not strain the true relations between things,

but simply evolves a conclusion which even the ordinary reason recognizes and accepts as a legitimate if not a natural deduction. So a note merges in a judgment, the leasehold in the reversion, the rents in the land; but it is against every principle of natural or artificial reasoning, to hold that a private corporation, although created for public purposes, merges in the sovereign political entity which is called the State.

Municipal corporations may be consolidated, and the new corporation made responsible for the debts of the old ones; but this, so far from being an analogy which can be urged in favor of what is contended for here, is not a merger into the State, but the creation by the State of a new corporation accompanied by a declaration of the sovereign will, as to responsibility for existing debts. It is true, too, that a sovereign State cannot be sued; and, therefore, in the Georgia railroad case, the State which was the indorser of the bonds of a railroad, which it afterwards bought at receiver's sale, could not be held liable on the bonds, because no suit would lie in any case in which the State would not be a necessary party, and hence a bill filed against others, without making the State a party, for the purpose of enforcing payment of the bonds, was dismissed. This is the full purport of the cases cited by the learned counsel for the United States and the counsel for the claimant. (Mount Pleasant *v.* Beckwith, 100 U. S., p. 514; Cunningham *v.* Macon & Brunswick R.R. Co., 109 U. S., 446.)

In the last case there was no pretence that Georgia became responsible by reason of the purchase of the road, but because she was an indorser on the bonds; there was no authority cited, and we will venture to say that none can be produced that the purchaser, of property subject to a mortgage thereby becomes responsible for the mortgage debt without his consent. Nor after a careful examination of the Georgia case have we been able to discover any reasoning of the court which furnishes the slightest warrant for the con-

tention of the claimant, that had the State been suable its responsibility for the bonds would have been enforced upon the principle of merger.

The State having possessed itself of the property of the road which had been mortgaged to secure bonds which bore her indorsement, it was very properly contended, that a trust was thereby created, which as against any one else than the sovereignty would have been readily enforced, and upon this point Justice Miller, who delivers the opinion of the court, says:

"On the hypothesis that the foreclosure by the Government was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued."

So in the present case, if this claim had been, on the pleadings, cast in a different mould, or was properly within our jurisdiction, without the formality of a proper technical presentation, and was sustained by proofs, we should not hesitate to say, that to the extent of the property and work and materials furnished by Flannagan, Bradley, Clark & Co., and appropriated by the State, there was a clear trust created, which bound the trustee to make restitution.

As matter of fact, however, even if such a result was practicable, there was no corporation in this case, and therefore could have been no merger. The four parties to whom this concession was originally made, entered into a construction contract for the building of the road, worked together, bought supplies, and proceeded with the construction of the line, taking others in with them as the work progressed.

The North American parties then retired, and transferred all their interest in the material furnished by them to their Venezuelan associates, and they in turn transferred the enterprise to the Government, and in doing so simply surrendered a franchise which they had received.

The claimant says that when he reached Venezuela the corporation, whose bonds he held, had disappeared. There was no president, no treasurer, no board of directors, and no

office. Did such officers ever exist? Rojas signs the bonds as president and Marcano as treasurer. But there is no other evidence of the existence of a corporation or of a board of directors, or that the managing part of this concern was anything more than the Construction Company.

It could not be pretended that this unincorporated association of individuals interested and engaged in the execution of a common enterprise could be merged in the Government, for here there would be not only moral but physical incompatibilities.

The name of the Railway of the East was assumed, it is true, but on the papers before us we are very strongly of the opinion that the holders of its bonds, in attempting to enforce any liability outside of the mortgage, would have looked in vain at any time during the three years before Venezuela took possession of the road for a responsible party, either individual or corporate, against whom they could proceed.

Where was and what was the Railway of the East during the period between the transfer to Rojas and Marcano in July, 1860, and the retrocession of these parties to Venezuela on the 19th of December, 1863?

It was Rojas and Marcano themselves, who by the express recitals of the mortgage were relieved from personal responsibility, the Government, the Government of the old Province of Caracas, the individual Venezuelan subscribers to the stock, and Flannagan and Clark. Against these parties in some way the bondholder might have proceeded, but as against a corporate body, which he could have cited into into court and made answerable for its debts, we see no evidence of his ability whatever; but laying aside the troubled condition of the country, we see no reason why immediate and effective proceedings might not have been taken to foreclose or sell the road under the mortgage, which contained full power of sale. While the Government had possession, of course, that might have been impossible (and yet we are informed by Commissioner Andrade that the Government was

suable), and for that reason we think the claimant, as representing the bonds, would have a strong equity to have been paid for the use of the things, to buy which the bonds were issued, and, other things being equal, provided there were not countervailing equities, we would be willing in a proper state of proof, as we have stated, to make an allowance. The Government, however, appears to have sold the road, and it is after this sale that the claimant visits Caracas and complains that he could not find the corporation.

The road was there, however, and as far as we can see by the papers, the original equipment, and besides $80,000 appears to have been spent upon it in some way by Venezuela. It was then in the possession of Clark, and why the claimant did not proceed to make good his debt out of the mortgage security he held, instead of pursuing the claim against the Government upon the theory of merger, is altogether unexplained, either by the papers or anything that was said at the argument. Certainly as far as parties are concerned he would have had as good a showing as at any time since the summer of 1860, or since the bonds took effect. He has the mortgage still, and, for any thing the record shows to the contrary, may enforce it still. But without carrying the opinion any further, we may in conclusion, briefly say, that as far as these claims are based upon a breach of contract, or upon bonds issued in furtherance of the enterprise, we are of opinion that the claimants, by their own voluntary waiver, have disabled themselves from invoking the jurisdiction of this Commission, and for that reason, as well as that the cause of action has been misconceived, and proofs therefore not supplied that otherwise might have been forthcoming, we will disallow the claims and dismiss the petitions without prejudice.

LITTLE:

An agreement, in my judgment, between the United States and Venezuela to submit these claims to a Mixed Commission for decision according to justice, superseded and took the place of any previous understanding between the latter and the claimants, if any binding one existed, to submit them to any other tribunal for determination. I do not agree, however, that any such understanding, binding or otherwise, existed relative to claim No. 25. On the contrary, with great respect, I think there was none.

The majority of the Commission express doubt whether that part of article 20 which binds the American concessionaries not to make a judgment, &c., the subject of an international claim is valid. I would go further, applying the objection to and holding invalid all that part inhibiting international reclamations. I do not believe a contract between a sovereign and a citizen of a foreign country not to make matters of difference or dispute, arising out of an agreement between them or out of anything else, the subject of an international claim, is consonant with sound public policy, or within their competence.

It would involve *pro tanto* a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty towards the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition. For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus we should have the spectacle of a state modifying the international law relative to itself! The statement of the proposition is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no

difference—confer no such authority. Such language as is employed in article 20, contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the government of the citizen at once becomes a party concerned. Its rights and obligations in the premises cannot be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it than he can against municipal protection.

A citizen may, no doubt, lawfully agree to settle his controversies with a foreign State in any reasonable mode or before any specified tribunal. But the agreement must not involve the exclusion of international reclamation. That question sovereigns only can deal with.

So much of article 20 as refers to that subject I regard as a nullity, and therefore cannot, even if in harmony with my colleagues as to the comprehension of its terms, concur in the dismissal of the claims on that ground.

I see in the papers here no sufficient basis for the principal claim of Flannagan, Bradley, Clark & Co. They complain that Venezuela conscripted the laborers, citizens of that country, at work on the railroad, and took their implements for military purposes, thereby stopping the improvement; that she failed to pay her stock subscription at maturity; that the occupation of La Guayra by the rebels subjected them to heavy demurrage; and that because of these things they were compelled to abandon the railroad enterprise and sell their interests therein at a sacrifice. Venezuela was then in the throes of civil war. Her right of conscription and appropriation for military purposes was fundamental. All contracts and enterprises were subject to it. The depleted treasury and failure to meet her obligations to the railroad company

must be looked upon as a consequence. Individual indirect losses always inevitably result from such a situation, yet they are without remedy. This claim in its ultimate analysis, in so far as it pertains to indirect damages, seems to be of that character—one occasioned by the accidents of war and for which governments cannot be held liable. In so far as it relates to tools, implements, and other property of the firm appropriated by Venezuela, there would be a remedy. But there is no specific allegation of damage in this regard, and no evidence showing the character or value of the articles taken.

That of the bondholders (Case No. 25) as I conceive, stands upon different ground. It in nowise grows out of the war. Here the contract was essentially between the bondholders and the railroad company. They knew not Venezuela, except as she was or might become responsible, directly or indirectly, for the company's obligations which they held.

There was no direct original liability from her to them. The question, or one question, is, did any supervene? The bonds when issued were secured by a mortgage on the railroad. That was one source of payment, but not the only one. They were no less a debt of the company because of the security. Whatever other property it had or should have at settlement, including unpaid subscriptions of stock could be looked to also if needed as a source of payment. The bonds were negotiated, it must be assumed, upon the faith of both sources. Neither the company nor any one else could lawfully extinguish or impair either source.

That Venezuela might as, and without other liability than, an individual purchase the equity of redemption in the railroad cannot be questioned. Such purchase would not carry with it, except by agreement to that effect, any personal liability on account of the debt secured; and it would constitute her the "sole owner of the enterprise of the Railroad of the East."

What her legal relation to that debt was and is, depends, I

think, much if not altogether upon the terms of the cession from Rojas and Marcano to her, Demcember 19, 1863. Unfortunately that document is not before us, nor is the substance of its provisions disclosed. What was the consideration moving from Venezuela for this partly constructed road, with its 660 tons of rails, locomotive, cars, and other valuable material and machinery? Did it embrace the assumption of the bonds? If so, Venezuela would be legally liable here. Otherwise not, unless by some unwarrantable exercise of power she prevented the corporation from exerting its faculties and applying its resources in furtherance of the purposes of its creation, and the discharge of its obligations. But the evidence here fails to establish anything of this kind. It is true the company apparently ceased to be, but its disappearance, as the papers incline me to believe, was the result of abandonment by its promoters, rather than of any governmental act of extinguishment. When they had all parted with their interests in it there was no one left to keep up its organization.

There is distinct evidence, however, of a recognized obligation on the part of Venezuela in respect to these bonds, either on her own account or as trustee after, and not improbably growing out of, the contract of December 19.

In the contract of sale to Clark, April 20, 1864, it is stipulated, Article 1, that "all the rights that *it*" [the Government] "*represents* and has now in the mentioned railroad, *with all the liabilities that* shall be expressed," shall pass to the purchaser. The third article provides for the surrender of 35 bonds to him, which Rojas and Marcano "delivered to the Government."

The fourth article stipulated that:

"Whatever advantages the Government * * * may obtain from the holders of the fifty-five bonds of the first mortgage, with the interest of nine per cent., which the original undertakers issued, in all like the thirty-five which were delivered to Arthur Clark with the understanding that if the benefits should result unincumbered they should appertain to Clark gratuitously, but if they should be subject to any liability that also shall devolve upon Clark."

Article 5 provides :

"Arthur Clark acknowledges from this date *the liabilities* which comprehend those *which exist* with those shareholders *and holders of bonds*."

Here we have the Government dealing with the liabilities "which exist" respecting the 55 outstanding bonds and transferring that liability to, or at least imposing it upon, Clark. Why does it thus deal with them? Here we have its promise that whatever advantage may accrue to it in obtaining these bonds shall inure to his benefit. That is, he is only to be charged with whatever the bonds cost the Government. Why trouble itself to obtain them? Here we have also his assumption of the "shareholders'" liabilities, among whom Venezuela herself was one to the extent of 50,000 *pesos*. Why did she provide for that beyond her own liability? I do not regard article 5 as an evidence of cancellation by the Government of the stock subscriptions, as counsel for the claimant seems to. It tends to show, rather, I think, that the Government had undertaken in the contract with Rojas and Marcano to assume the subscriptions itself, or to save harmless the subscribers. These stipulations show to my mind that the Government at that time had resting upon it an obligation of some kind, and to some extent at least in respect of these bonds. Otherwise, why concern itself about them further than sell subject to the mortgage. It is possible to reconcile its course perhaps with a desire and purpose on its part to rid itself from its stock subscription which was liable in equity to be collected and applied in payment of the bonds. But in that case there is the recognition of obligation to that extent. It is impossible now to ascertain the exact facts bearing upon these questions. Under the circumstances, on the eve of the dissolution of the Commission, I would go to the extent the disclosures, unsatisfactory as they are, appear to justify and apply Venezuela's subscription on the bonded debt. It is said she had paid $80,000 on the road. That is not clear, and if it were, it would not obviate her subscrip-

tion. She cannot discharge her obligations by applying the amount owed to the improvement of her property. It was *after* such payment she undertook to deal with these liabilities, thus disclosing a conscious obligation respecting them.

I am disposed to believe from article 6 in the Clark contract that the $80,000 included what she had paid and expected to pay on account of these bonds. It seems to me it would not be inequitable or unjust to apply the subscription due with interest on the bonds, leaving the holders to look to the mortgage for the balance, or to Venezuela, if they choose, should it be made to appear hereafter that she actually assumed their payment in the contract with Rojas and Marcano, or otherwise became obligated therefor. She has all the valuable property imported for the road and the benefit of the labor and money expended thereon by the contractors, nothing ever having been paid for them save the bonds. Were there time I would enter the allowance, with leave to either party to move for a new hearing.

I must, therefore, dissent from the conclusion of my colleagues to dismiss this case. As it, with No. 20, is to be dismissed, however, I quite agree this should be done without prejudice. The failure of Venezuela to produce the proofs called for, and which it was reasonably expected by the claimants she would be able to supply, leaves the cases in a condition of submission not, in my opinion, contemplated by the treaty.

Claim of

AMELIA DE BRISSOT, RALPH RAWDON, JOSEPH STACKPOLE, and NARCISA DE HAMMER
v.
THE UNITED STATES OF VENEZUELA.

Nos. 27, 28, 29, 30.

[August 26, 1890.]

ANDRADE:

The Government of Venezuela granted in May, 1849, to E. A. Turpin and Frederick Anthony Beelen, citizens of the United States of America, and to their associates and successors, an exclusive privilege to navigate the rivers Orinoco and Apure, for eighteen years, running from the date of the aforesaid concession.

To work the said privilege, a corporation was legally organized in New York, in October of the same year, 1849, under the name of "The Orinoco Steam Navigation Company of New York."

It appears that this company went so far as to put four steamers in actual service, three of which, the *Meta*, the *Apure*, and the *Barinas*, were still running in 1856 and 1857, and only two of them, the *Apure* and the *Guayana*, from 1858 to 1861; only one, the *Apure*, existed about 1865.

The *Apure* left Ciudad Bolivar on the 9th of October, 1865, on one of her ordinary trips, carrying on board a very light cargo, and a small number of passengers, for Nutrias, the extreme point of her journey, and the intermediate ports. On her way through, she touched at San Fernando, capital of the State of Apure, where, on the morning of the 17th, the passage fares agreed on having been paid, she took on board the President of the State, General Juan Bautista Garcia, and a small military force (about 9 officers and 50 men), to land them at a point on the upper Apure within his jurisdiction, which General Garcia would opportunely designate.

On the night of the 18th, the steamer being moored at the port of Apurito, one of her usual landing-places, for which she carried some freight, she was suddenly attacked by a force of rebels against the Government of General Garcia, who had been advised in advance of the presence of said General on board the steamer with an armed force.

The origin and cause of the above-mentioned four claims are to be found in this regrettable event, since during the seven hours' fight of that night, the captain of the steamer, John W. Hammer, and the chief engineer, Julius de Brissot, whose wives' claims are for $50,000 and $30,000, respectively, were killed; Joseph Stackpole, another engineer, claiming $15,000 indemnity, was wounded; and in consequence thereof, The Orinoco Steam Navigation Company suffered damages, which its secretary, Ralph Rawdon, estimates at $100,000.

No question has been raised as to the citizenship of Ralph Rawdon and Joseph Stackpole, but not so in regard to that of Narcisa de Hammer and Amelia de Brissot and their respective children. As to the latter, there is no proof whatsoever regarding her marriage or the children issued from it, while such proof exists with respect to the former and her four children. However, I have no objection to treat both marriages as if legally proved, and before going further, will try to solve the doubt respecting their citizenship, in order to dispose at once of the question of jurisdiction therein involved.

Every independent State has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions, and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extra-territorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which, the legislative compe-

tence of each State does not extend beyond the limits of its own territory. Otherwise, any one could be at the same time a citizen of two States, which is as inadmissible as not to be a citizen of any State at all.

"Each individual is by the rule a citizen of one State only, and has political rights only in one State" (Bluntschli).

By virtue of that right, Venezuela declared in her constitutions of 1830, 1857, 1858, and 1864, a Venezuelan citizen by birth, every free person born in the Territory of Venezuela, such, for instance, as Narcisa de Hammer and Amelia de Brissot. The former was undoubtedly born in that republic, and there are strong reasons to think just the same about the latter.

Through the force of the same right, the United States declared to be a citizen, by the law of 1855, "every woman capable of naturalization, married, or who might marry thenceforward a citizen of the United States," like Narcisa de Hammer and Amelia de Brissot.

Therefore, if this question of citizenship were brought before a court of Venezuela, it could not be decided otherwise than according to the Venezuelan constitution, because only this law would have authority in that case, to decide whether the above-mentioned women ought to be regarded or not as citizens of Venezuela. And for the same reason, if it were raised before a court of the United States, it should have to be decided in accordance with the law of 1855, because only that law could determine whether, by their respective marriages with John William Hammer and Julius de Brissot, they were to be considered or not as United States citizens. But they could neither invoke in Venezuela the law of the United States to repeal that of the place of their birth in respect to their citizenship, nor the law of Venezuela in the United States, to assert, against that of their country by naturalization, that they are Venezuelans; because, as already stated, it is impossible to admit in principle that

the application of the domestic law may yield on this point, under any consideration, to the foreign law, nor that one State may arrogate the right of impeding another State in applying the laws it may have deemed convenient to enact in that behalf.

In the foregoing instances the solution has been easy, because the question of citizenship was one of internal law and the juridical criterion applicable to them was certain. But the courts of a third State, Spain or England, for instance, before which those very same cases might be brought, would have to deal with a question of international law or of a double citizenship, or with a conflict between two different laws appertaining to two different States, in deciding whether Narcisa de Hammer and Amelia de Brissot were Americans or Venezuelans. And that difficulty is the same which this Commission has now to deal with. How are we to overcome it? In our judgment, by applying to it the general principles of international law.

Narcisa de Hammer and Amelia de Brissot were born in Venezuela, and both married there to citizens of the United States, in 1853, before the law of 1855 had made them also citizens of the United States. So the citizenship which they afterwards acquired by operation of this law, cannot be said to have been acquired consciously and voluntarily; while, on the other hand they have, after becoming widows, continued to reside in Venezuela, without having ever made any declaration whatever as to their desire of preserving such citizenship, or without having ever come to the United States; which seems to show, not only by the fact of their birth, but also by their own free will, that they prefer the Venezuelan citizenship. To declare them citizens of the United States against their express or presumptive good-will, would be contrary to the general principles of right, and to those of international law now prevailing.

"*The status civitatis* is a quite personal right of man, and it belongs to him before all the States of the world, for which reason it must be held as

a maxim, that every person should be permitted to belong to this or to that political body, and therefore that no sovereign can pretend to impose upon a man citizenship against his manifest or presumptive will, or prevent those who may have acquired it, from freely renouncing it and acquiring another." (Fiore.)

"Supposing, finally, that an individual united in his person several nationalities, it would be necessary to apply the law *best agreeing with his actual position*, otherwise the question would be insoluble."—Heffter.

"Certain persons or families may, by exception, be under the jurisdiction of two or a greater number of different States. *In case of conflict, the preference should be given to the State in which the person or family referred to actually has her domicile; her political rights in the States where she does not reside shall be considered as in suspense.*"—(Bluntschli.)

As to the children of Narcisa de Hammer and of Amelia de Brissot (admitting that she has any) they were also born in Venezuela, where they have been residing since the death of their fathers. Having attained their majority they have not claimed the paternal citizenship, nor have they fixed their domicile in the United States. This conjuncture of circumstances seems to clearly indicate that they too have renounced the citizenship of their filiation and chosen that of their birthplace and permanent domicile. According to the principles already invoked that nobody can be citizen but of one State, that citizenship is inherent in the person and cannot be imposed, and that in case of conflict between several citizenships, that is to be preferred which is more in accordance with the actual position of the person, namely, that of the place of his actual residence and domicile, the said children as well as their mothers must be held to be Venezuelans, and to have no standing before this Commission.

Let the liability of Venezuela for these claims be now carefully examined from other points of view. Here is the reasoning of the claimants.

General Garcia caused the conflict that occurred at Apurito on the night of October 18, 1865, by placing his officers and troops on board the steamer, and requiring Captain Hammer to undertake a service for Venezuela, the performance of which, he knew, would place their lives in peril, and which

was undertaken by Captain Hammer reluctantly, under protest, if not under military coercion; by requiring Captain Hammer to proceed to Apurito; by not leaving the steamer with his officers and men when informed by the spy that hostile forces were in the plaza; by sending a squad ashore from the steamer, and when it was fired upon and routed allowing it to take refuge in the steamer; by refusing to debark with his officers and men, and by making the steamer a shelter for himself and them. General Garcia was the President and Chief Executive of the State of Apure, one of the States of the Republic of Venezuela. The obligation rested upon Venezuela to protect the lives and property of the citizens of the United States. It was the duty of General Garcia, who was one of the civil as well as military officers of the Republic, to see that this protection was afforded them. He not only failed to give them this protection, but required them under compulsion to perform a perilous service in behalf of Venezuela. Then Venezuela caused the conflict and is liable therefor. Though the cause could not be imputed to her directly, she should always be held subject to responsibility according to the principle set down by Wharton, that—

"The sovereign is responsible to alien residents for injuries they receive on his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents."

General Garcia was in fact, as it appears, President of the State of Apure, of the Republic of Venezuela, and as such the natural chief of the military forces of that State; but it cannot be concluded therefrom, that he was a civil or military officer or agent of the Government of the Republic. Quite to the contrary. The Federal Constitution of 1864 provided:

"ART. 1. The provinces of Apure, Aragua, Barcelona, Barinas, Barquisimeto, Carabobo, Caracas, Cojedes, Coro, Cumaná, Guárico, Guayana, Maracaibo, Maturin, Mérida, Margarita, Portuguesa, Táchira, Trujillo, and Yaracuy, *are declared independent States*, and they unite themselves to form a free and sovereign nation under the name of the United States of Venezuela."

The State of Apure was, therefore, an autonomous State, and its government was independent of the Government of the United States of Venezuela. General Garcia was not an officer or agent of the Republic, but of the public authority of the State of Apure, and hence, though he had really been the originator or efficient cause of the Apurito event, it would be contrary to sound logic to deduce therefrom the consequence that said event had been caused by Venezuela.

The same thing may be said of the so-called compulsory service required from Captain Hammer by General Garcia; that it was not a service for Venezuela, but for the State of Apure. This distinction does not lack importance, because the international responsibility of Governments for the acts of their officers, its extent and quantity, and the rules by which it is to be determined, vary according as the act or acts out of which the liability may arise, have emanated from agents appointed by the Government, and dependent upon it for their functions, or from officers not appointed by the Government, or who are not under its immediate direction and control. In the first case, the acts of the official representative are one with those of the Government under the authority of which he has acted, and are imputable to it. In the second case, the question of the imputability is more complex.

The responsibility of governments, in general, for damages caused to foreigners, is founded on the ground that the State being a moral person endowed to a certain degree with the same capacity and liberty as are enjoyed by the citizens who compose it, is bound as such to account for its own acts when they cause some injury to another State, or to the citizens of another State. For the same reason it is held bound to indemnify the damages caused by the persons under its dependence, and for whom it is accountable.

But in the State a double juridical person is to be recognized; the civil person, inasmuch as it is the possessor of its patrimony and has the capacity to administer it; and the

political person, so far as it is a political, independent, and sovereign entity charged with the preservation of the public order and the protection of the citizens. Considered in the first aspect, its responsibility towards the foreigners damnified or injured by the acts of its officers is purely moral, and only in the case of complicity, or of manifest denial of justice, could it become international. In this aspect it is contemplated by Cushing, when speaking of the two classes of officers employed in the administration of public affairs. He says:

"But for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the Government."

And in the same aspect Calvo regards it when he writes:

"Within the circle of jurisdictional limits, all the agents of the authority are personally and solely responsible for their acts in the measure established by the internal public law of each State. When they fail to fulfil their duties, exceed their powers, or violate the law, they create according to circumstances in behalf of those whose rights they injure, a legal remedy in conformity with administrative or judicial procedure; but in relation to third parties, native or aliens, the responsibility of the government that has appointed them is purely moral, and it could not become direct and effective but in the case of complicity or of manifest denial of justice."

With regard to the political personality, the international responsibility of the State for the acts of its officers in the exercise of public authority, is subject to clear and well-known rules. Such responsibility is admitted, but only in the case that upon an examination of the circumstances, the fact which has produced the damage to foreign interests may morally be imputable to the State. Fiore and Calvo concur in subordinating it to four conditions, to wit:

"1. That the Government may have known in due time to prevent it, the illegal act which its officer intended to commit, and did not prevent it.

"2. That it, having been enabled to revoke in time the act of its officer, did not revoke it.

"3. That the ignorance of the act intended by the officer may, by its circumstances, be judged as malicious or criminal.

"4. That having been advised of the facts, it had not pressed itself to blame the acts of its agent, nor to take the proper measures to prevent in future the repetition of the same faults."

Now, supposing for the sake of argument, that General Garcia had been an officer of the Federal Government, and his embarcation in the steamer *Apure* an illegal act, did the Government know it in time to prevent him from committing it? Could the Government know it? Could its ignorance be attributed to malice? Would it be just to impute it to the Government? It seems sufficient to set down these questions in order to observe that they cannot be solved otherwise than by the negative. The *Apure* arrived at San Fernando on the 16th of October, and on the 17th, at six o'clock A. M., left that port, having on board General Garcia with his officers and troops. Between San Fernando and Caracas there is a distance of over 200 miles by land (by water much greater), and at that epoch there was no other telegraphic line in Venezuela than the one from Caracas to La Guayra and Valencia. The same thing may be said regarding the event of Apurito. How could the Government of Caracas have known it before it was accomplished, if even after its consummation, it took one month to come into possession of the first news about it, through the note of Mr. Wilson, of November 13, 1865?

As to the inactivity which is attributed to the Government after it was informed of the occurrence, it is well to recall the diligence shown by General Arismendi, President of the State of Guayana, in his engagement to have the truth duly ascertained through a judicial inquiry by the Court of 1st Instance of Ciudad Bolivar, since November 9, the date of the arrival there of the steamer *Apure* with the most recent account thereof. The meeting of the consuls and other foreigners, held at that town on the 12th of November, passed a vote of thanks to His Excellency General José L. Arismendi, "for his prompt and energetic measures towards a thorough examination into the details of this outrage;" and if the pretended blamable

action of the President of Apure is placed as a debt to the account of Venezuela, justice requires that the praiseworthy action of the President of Guayana be equally placed to her account as a credit.

Besides that examination, among the documents are to be found, as evidence of what was done by the Government of Venezuela to speedily obtain official information about the occurrence at Apurito, several notes exchanged, from November 16 to a later date, between the Minister of Foreign Relations at Caracas, and those of the Interior and Justice, and of War and Navy; a report from the Military Commander of the State of Apure to the Minister of War and Navy, of November 29; another from the National Attorney at San Fernando to the Minister of the Interior and Justice, dated January 9, 1866; another from the new President of the State of Apure, addressed also to the Minister of the Interior and Justice, under date of January 10, 1866, and, finally, an investigation instituted on the 13th of the same month of January before the Circuit Court of Lower Apure by the National Attorney in the State. This suffices to demonstrate that Venezuela did not neglect on that occasion to adopt the means and measures proportionate to the gravity of the case, and is sufficient to withdraw from her the charge of voluntary omission of diligence, which is brought to-day against her. Governments are not bound in such cases to show an extraordinary activity.

"It would be an excessive and unreasonable pretension to demand that a government, occupied as it ought to be in the fulfilment of its multiple functions and duties, should work in all times and circumstances with mechanical precision." (Fiore.)

That was, furthermore, what the political institutions in force allowed her to do. The States of the Venezuelan Union were, as it has been said, independent and maintained in all its fulness the sovereignty not expressly delegated to the Federal power. They possessed the exclusive right of civil and criminal legislation within their own territory, and their

courts of justice were independent. Their officers of every category were held responsible only before their own jurisdiction. The Government of the Union could not maintain therein any other resident officers vested with jurisdiction and authority than those of the State itself, except those of the Treasury and of the national fortresses, parks, navy-yard, etc., who had jurisdiction only over the affairs belonging to their respective offices, and within the precinct of the fortresses and barracks, being on all other matters subject to the general laws of the State in which they resided. Nor could it station in any State troops or military chiefs with command, even of the State itself, without the permission of the State. Nor could the Federal Executive interfere by force of arms in the domestic contentions of a State; the only thing permitted to it was the offer of its good offices with a view to bring about a peaceful solution. (Constitution of 1864.)

However imperfect or inefficacious to protect the rights of foreigners that constitution may be judged to be to-day, it is not known of any foreign government having ever made the slightest remark to the Venezuelan Government in that regard, and it is presumed that those foreign citizens who, after its enactment, remained in Venezuela, carrying on their commercial business and navigation privileges, voluntarily submitted to it. All that could be demanded from the Government of the Republic was its loyal and faithful observance in relation to them.

"If a government had adopted, with perfect loyalty and good faith, all the measures at its disposal to obviate an inconvenience; if it had employed all the legal proceedings to prevent and punish him who had caused an injury to a friendly state, *it would not be just or equitable to declare it responsible for not having employed means incompatible with the spirit of the political institutions, or for having been unable to modify the imperfect system of laws which it found established.*" (Fiore.)

Mr. Dalton, the United States consul at Ciudad Bolivar, was no doubt mistaken when, in his protest of November 21, 1865, he holds the Republic of Venezuela liable *for the disasters, and murders attendant upon the attack of Apurito, for*

its neglect of its relations with the State of Apure, one of its constituent portions, inasmuch as the president of the said State of Apure, Juan B. Garcia, a general in the army of the Republic, was in actual revolt against its supreme authority.
* * *

General Arismendi was undoubtedly not less mistaken, when alluding to his position and that of General Garcia, in his reply to the consuls at Ciudad Bolivar, he expressed his belief that according to the legal system of Venezuela, the Government of the Union alone could decide such cases, and that with regard to his public acts General Garcia had no other superior than the National Executive.

And the learned counsel for the United States before this Commission falls into the same error to-day, in asserting that the offenders, so called by him, were all under the jurisdiction and authority of the Federal Government of Venezuela, all officers in the service of the Venezuelan Republic.

The truth is, that according to the constitutional law of Venezuela in 1865, General Garcia, the legal president of the State of Apure, was responsible only to the legislature of the said State, and that the Federal Government had not the legal power to punish him, or even to treat him as a rebel, except by the law of war when it had subdued him by force. But it is not shown that he was in revolt at the time against the Federal Government. It may be that he did not want to recognize the National Attorney appointed by that Government for the State of Apure, on account, perhaps, of regarding it contrary to the right of independence of the State; but that was a question of law, not of war.

At all events, within the limits of the exercise of public power, Venezuela seems to have done all that she was bound to do in behalf of her international duties towards the United States. Yet it is important to add that the merit of the evidence affords no ground for imputing to General Garcia any fault whatever.

In view of the insurrection of Generals Sosa and Mendez,

Garcia, in his capacity of President of the State, and in the interest of public order, had the right under the law of nations to detain the steamer *Apure* on her arrival at San Fernando, and to employ her for the transportation of troops and articles of war, without any other condition than previously to settle and pay the price for the service required, and without further responsibility than for the material damages suffered by the steamer on account of her detention, or of her departure from the regular and usual course of her voyage, or the loss of cargo, etc.

"In cases of civil troubles or foreign war, the interest of self-defence or security may impose upon a State the moral obligation of temporally interfering with commercial transactions, of stopping the movement of merchant vessels, and even of seizing them for the transportation of troops and ammunitions, or for any other military operation. State reason surpasses here private interest, whether national or foreign, and legitimates the adoption of these extreme means.

"The exercise of these two rights, especially the latter (the requisition of a merchant vessel for any public service), is extremely delicate, and requires great regard for the private foreign interests that it sometimes affects. * * On the other hand, by taking possession of her (the vessel) for a public use, by employing her in military operations, which necessarily are of a hostile nature, it destroys her neutrality, exposes her to risks and dangers of capture or detention, which equity demands that she be insured against, since she has not been able to avoid them. The rule universally recognized on this subject is, therefore, that any government which may be compelled by the circumstances to resort to such appropriation to public uses, is responsible not only for the material consequences to the vessel made the object thereof, but is also held bound before enforcing her requisition, to settle with the interested parties and pay the indemnity due for the service demanded." (Calvo.)

But General Garcia did not make use of that right, as it appears. The assertion that the service rendered by the steamer *Apure* was compulsory, has no foundation. The officers and crew say in their protest entered early in the morning of October 19, on the very spot of the combat:

"On the 17th instant, at six o'clock A. M., after Captain Hammer *had agreed* with the General-in-Chief, Juan Bautista Garcia, President of the Sovereign State of Apure, for the transportation of fifty soldiers and his officers, their passage and freight having been paid in advance, both more fair than the customary, as provided in the treaty with the national Government, we started for the port of San Fernando."

And the foreign consuls residing at Ciudad Bolivar, in their Manifest of November 12, say:

"At this place, General Juan B. Garcia, the President of the State of Apure, *demanded* transportation for himself, seven officers, and fifty-one soldiers, with the military material, to be taken at the usual rates of passage and freight, stipulated for in the charter of." * * *

And Consul Dalton, in his letter to Ralph Rawdon, of November 25, writes:

"She (the steamer) arrived at San Fernando, midway on the route up the river, where *she was applied to by the legal authorities* to carry some military forces, about 60 soldiers."

And the Secretary-General of the Executive of the State of Apure, in his certificate of January 18, 1866:

"On the 16th of the same month (October, 1865) the steamer arrived at San Fernando, and immediately General Garcia *contracted* with her captain, citizen John Hammer, for passage for himself, for myself, several officers, and fifty soldiers."

And the Secretary of General Garcia, in his deposition before the circuit court of Lower Apure, January, 1866:

"I know that President Juan B. Garcia, who acted as such about October 16 of last year, *contracted* on said date with the captain of the steamer *Apure*, Mr. John Hammer, for the passage of a force, with their officers."

And the president of the State of Apure, who succeeded General Garcia, in his note of January 10, 1866, addressed to the Minister of the Interior and Justice:

"General Garcia, who was acting at the time as president of the State, *contracted* with the captain of the steamer, John Hammer, for passage for himself, several officers, and fifty soldiers."

No allusion is made in any of these references to the two protests which Mr. Wilson, Minister Resident of the United States, speaks of in his note of February 25, 1867, to Señor Seijas, nor to any other sign of opposition or reluctancy, nor to the absence of Captain Hammer during the steamer's stay at San Fernando, and of which General Garcia is said to have taken advantage to place his troops on board. Probably such absence did not occur, as the steamer arrived there on the 16th and left again early on the 17th. Surely Captain

Hammer was not two days refusing to grant the passage applied for by General Garcia, since the steamer did not remain even a whole day at San Fernando. All the probabilities are that such refusal did not exist. Were it not so, Salom, the secretary of the steamer, who received the money for the passage, and ought to know all the circumstances of the affair, would have mentioned it in his protest of Apurito, expressly intended to protect the company against all responsibility, and to secure its right to be indemnified for the losses and damages suffered the preceding night. Were it not so, Mr. Dalton would have been careful enough to give prominence to that circumstance in his interrogatory to the witnesses before the Court of 1st Instance of Ciudad Bolivar, where he appeared so eager to find General Garcia guilty, and to justify the conduct of the officers of the steamer. Were it not so, finally, the same Mr. Dalton would have no doubt called that fact to the attention of Ralph Rawdon, in his letter of November 25, 1865, in which he simply says that the legal authorities of San Fernando had applied to the steamer, etc.

The same thing may be said about the declaration, attributed to General Garcia, of not permitting the steamer to leave, unless she took him with his officers and troop on board. Mr. Wilson's statement is, perhaps, the only foundation for such incident. Probably Captain Hammer had no motive to refuse transportation to General Garcia. He knew that the State was in revolt since some days before; he was cognizant of it before leaving Ciudad Bolivar, and, besides, that was public and notorious at San Fernando. But General Garcia was the legal President of the State, and the boats of The Orinoco Steam Navigation Co. were, by article 10 of their charter, to serve at any time as transports to the Government, and, in fact, they had been serving as such during the whole revolutionary period of Venezuela, from 1849 to 1863, the five years of the Federal war inclusive; not only without any prejudicial accident, but with large profits to the

Company; in the sole year 1860, the Government of the Republic had paid them for that service $86,487. General Garcia was not going to encounter the enemy; the scanty number of his force was the best proof of his inoffensive design. He did not take passage for a determined point, but for some place in Upper Apure, within his jurisdiction, which he would designate later on; he had not the intention, perhaps, to land at any place whatever, but to remain in the river on board the skiffs he took with him at San Fernando, together with the other force that went to meet him in the steamer the night of the fight. His passage and that of his small expeditionary force would leave to the Company a benefit of over $300, without any danger. Why not accept it?

In the arrival at Apurito, which perhaps is to be considered as the real occasion of the peril which the steamer met with on the night of the 18th October, 1865, General Garcia does not seem to have had any participation; he had nothing to attend to there. Apurito was, like San Fernando, one of the ordinary ports of the steamers of the company on their regular course from Cuidad Bolivar to Nutrias, and the *Apure* called there this time, as usual, to land a portion of her cargo. In regard to this particular there is no doubt or contradiction. Where is General Garcia's fault?

He is accused of not having permitted the steamer to be unfastened and held off, in order to prevent the attack, on learning that the enemy was in the town. This charge rests on no proof whatever; nor can the interest be perceived that General Garcia could have, in not taking advantage of that means to save himself, by saving the steamer, from the danger to which they had been unexpectedly exposed; he had not left San Fernando under an aggressive attitude, and probably he was not prepared to fight against an enemy whose force and situation were unknown to him. Such a charge, but with stronger reason, perhaps, could be made against Captain Hammer, did it not appear, as it does appear, that he gave the order to cast off, and that if it was not complied with, *it was because the enemy did not permit it.*

"At any rate, there can be no doubt that the losses of life and property, which occurred at Apurito, might have been avoided if General Garcia had chosen to prevent them; for all the facts show that if he and his officers and men had behaved with the ordinary courage and discipline of soldiers, and had left the vessel, *as they should have done when they found that she was in danger*, or if he had permitted the steamer to be cast loose from the shore, when the attack began, *nothing serious* would have happened.

"Whatever view may be accepted of his action in taking this passenger steamer for the hazardous service in which he proposed to use her, it is unquestionable that his conduct, after she reached Apurito, was in violation of every duty he owed to the property and persons under his protection." (Brief of the counsel for the United States.)

It has already been shown that General Garcia *did not take the steamer* by right of authority, as he could have done, *nor did he propose to use her in an extraordinary service;* but like any other passenger, took passage therein for a certain point in Upper Apure, near which she had to pass on her regular course to Nutrias. Transported on the way to Apurito, where the steamer had to call, he found himself, by accident, placed within the enemy's camp.

It is probable that if he had landed then with his guard, nothing serious would have happened to the steamer or her officers, for all the facts show that the attack was not directed against the vessel but against the president of the State and his military force that she had on board. Nevertheless, it would be contrary to the facts to contend that *nothing serious* would have also happened to General Garcia and his troop; the fate which the squad that he sent on shore met with, negatives such contention. Thus, what the claimants should have endeavored to prove was that, on such an occasion, the protection due by Venezuela to the citizens of the United States and their private property, imposed upon the president of the State of Apure the obligation to offer in sacrifice himself, his officers and men, and above all, the social interests represented by them. Will it be necessary to recall that in the conflict of rights, the one of more important concern and of more universal order and more evident title, or in other words, the stronger one, is to be

by natural reason preferred to the less important, of less universal order and less evident title, or to the weaker one, and that the social or public right, in other terms, the right of the State, is stronger than the individual, private right, or right of the citizen? Where is, therefore, the fault of General Garcia?

At least it seems just to recognize that General Garcia's conduct at Apurito did not violate any duty of Venezuela's toward the United States. The right and duty of self-preservation and defence, as well as the laws of war, entitled him to continue occupying in that emergency the steamer, which a combination of casual circumstances had put under his martial law. His duties as the President of the State of Apure obliged him to act so, if he believed it necessary to protect the possession of his authority attacked and the welfare of the community confided to his care. The legal duties of persons in the position of General Garcia are strict and imperative; if they fail to do all that they are required by the circumstances to do, they incur solemn responsibility, legal and moral, and everybody can value the importance that the actual occupancy of the steamer ought to have had for him, were it only to prevent her from falling into the enemy's power. The defence of the party attacked is always just, because it is conformable to moral order, and gives right to the adequate means for securing that end, and also to the spontaneous help of all those who are in a condition apt to furnish him assistance, because every man is bound to co-operate to the preservation of the others, and from this obligation springs the right to obtain his help. These are rules of natural justice imposing obedience, especially with respect to heads of government, whose loss is supposed ordinarily to produce disorder and confusion in the societies governed by them.

It is true that the very right of defence, notwithstanding its perfect accordance with natural justice, is, however, limited to *necessity*. But General Garcia could not be justly charged with having exceeded that limit. On the contrary, by his moderation and prudence, he seems to have supplied a motive

to be accused of want of courage and discipline. His action in sending to shore a squad as soon as he knew the impossibility of casting off from the port, does not prove that he had changed his condition of the party attacked for that of aggressor. Sometimes the true aggressor is not he who attacks the first, but he who has put his adversary in the necessity of attacking to defend himself. This is doctrine of natural justice.

Even admitting, then, the general rule of public law recognized in the message of the Executive, General Falcon, presented to the Venezuelan Congress, February 26, 1867, that "it is the *central power* that represents the interests of the Federation in the great society of nations, to which *it alone is amenable for all the acts violating the principles of international law, which are committed by any State whatever;*" even admitting that, according to that rule "the United States might have the right to look to the Federal Government of Venezuela for redress for wrongs done to their citizens by the authorities of any State of the Venezuelan Federation;" yet in the case of Apurito, the United States seems to have not that right, for there was not any wrong act of the State of Apure for which Venezuela could be amenable.

As the losses of life and property which occurred at Apurito were the natural consequence of an act of war, in which the part of General Garcia was purely defensive, and the aggressors were not officers or troops either of the Government of Venezuela or of the State of Apure, but of a political party in a state of rebellion against the legal authority of the latter, it is evident that this case does not fall either in the division of acts of public officers, or in that of acts of private citizens, for which governments may, under certain circumstances, be held internationally responsible. According to the evidence submitted, this is clearly a case of losses and damages suffered by foreign citizens in times of internal troubles or civil wars. Is Venezuela amenable in such a case?

Relying upon her own laws, certainly not. Since 1854

(6th of March) her Congress had enacted a law to the effect of defining her responsibility in such cases:

"ART. No foreigner has any action to claim of the Government of the Republic, by way of indemnity or redress, the damages and losses that their interests may suffer in consequence of political commotions, or any other cause, *when such damages and losses shall not have been committed by lawful authority.*"

Some passages of diplomatic correspondence have been alleged by counsel for the claimants, in proof of the opinion that the said law of Venezuela was enacted without any due sense of the obligations of the Government of that Republic to other Governments, pursuant to public law and to treaties.

With respect to treaties, it does not appear that Venezuela has ever recognized in her treaties with European or American nations any principle contrary to the one enforced in the law before quoted; at least in that of 1860 with the United States she did not. Far from it, in her treaty of recognition and amity, of 1845, with Spain, both parties accepted in principle the doctrine of the Venezuelan law of 1854, in reciprocally declaring that they would not make any claim for damages or losses, caused by the war (Art. 11), and the same doctrine was afterwards, in 1858, formally admitted in the treaties with Sardinia, and with the former Hanse towns.

Pursuant, now, to public law, are Governments responsible, or are they not, for the losses and damages resulting from such cause?

"This question has been discussed at length, and at the end solved in a negative sense.

"To admit in such cases the responsibility of Governments, that is to say, the principle of indemnity, would be to create an exorbitant and lamentable privilege, essentially favorable to powerful States, and injurious to weak nations, and to establish an unjustifiable inequality betwixt natives and aliens. On the other hand, by sanctioning the doctrine which we impugn, a strong though not direct attempt would be made against one of the constitutive elements of the independence of nations, that of territorial jurisdiction; such is, in fact, the real scope, the true meaning of that so frequent resorting to the diplomatic course, to solve questions which, by their nature and the circumstances in which they are produced, belong to the exclusive province of the ordinary tribunals.

"Summing up now our views on this subject, we feel compelled to conclude:

"1st. That the principle of indemnity and of diplomatic intervention in favor of foreigners, by reason of damages suffered in cases of civil war, *has not been, and is not, admitted by any nation of Europe or America.*

"2d. That the Governments of the powerful nations exercising or imposing this pretended right against States, relatively weak, *commit an abuse of power and force that nothing could justify, and as contrary to their own legislations* as to international usages and to political conveniences." (Calvo.)

"A nation which would not prevent its subjects from causing damages to foreigners would engage its responsibility, because the natives, being under its authority, it must look after them in order that they may not cause damages to others. *But such negligence does not render a nation responsible for the acts of those among its subjects who have put themselves in a state of insurrection and have broken their bonds of loyalty, or who are no longer within the limits of its territory.* Under such circumstances, and whatever the character attributed to their acts and conduct may be, *those citizens cease to be in fact under the jurisdiction of their Government.*" (Rutherforth.)

"States are not bound to allow indemnities for losses and damages suffered by aliens or natives resulting from internal troubles or civil war." (Bluntschli.)

"As to damages suffered in case of war or revolution, foreigners have no right to be indemnified by the State where they reside; that would be to demand for the persons residing in another country advantages which the natives do not enjoy. When a person establishes himself in a foreign State, he is bound to bear the consequences. The claim of England against Naples and Tuscany, in 1848, was rejected, and not only that, but the Russian Government, having been invited by the two Italian States to act as umpire, refused the arbitration on the ground that the English demand seemed to it so groundless that to accept the part of umpire would have been to admit doubts which did not exist. Just so in 1851, the United States refused to indemnify the Spaniards murdered by the mob at New Orleans, and did not grant reparation for damages, except to the Spanish Consul, who had been insulted, and who on account of his official character was especially placed under the protection of the Government." (Heffter, Note G.)

The aforesaid opinions are entirely in accordance with the law and practice observed by the various nations of Europe and by the United States in their mutual relations, and also with the Venezuelan law of 1854. Certainly not with the rule that they have pretended to impose upon the other American States in general, that aliens are more entitled to protection and have right to greater and stronger privileges than the natives of the country where they reside. But can the general principles of international law be changed ac-

cording as to the places where they are to be applied? Can they be deprived in South America of the virtual justice which they possess in Europe and North America? Is the principle of exception just? To these questions Calvo answers as follows:

"This principle is intrinsically contrary to the law of the equality of nations and most disastrous in its practical consequences. In its absolute claim against the American States, it is not only noxious to the maintenance of relations of good harmony, but it is, above all, highly unjust, inasmuch as the European Governments do not adopt it as the invariable rule of conduct among themselves. Every law, in order to become acceptable and respectable, ought to rest on the basis of equality, to protect the weak as well as the strong; to defend the rights and interests of each one without discrimination; in one word, to weigh equitably upon all. The moral bonds which unite the peoples are of the same order, and imply an absolute character of solidarity. A State, therefore, could not claim among the other States a privileged situation which it would not be ready to grant them at its turn, nor claim for its subjects advantages superior to that which constitutes the common law of the inhabitants of the country."

And Bluntschli:

"The maritime powers that have acted otherwise and forced the smaller States to allow indemnities, have taken advantage of the superiority of their forces."

And Fiore:

"Protection is illicit and unjustifiable where it has for its purpose to secure in favor of the citizens residing abroad a privileged position.

"Strong and powerful governments must not take advantage of their superiority and exaggerate the duty of protection by exercising pressure upon weak governments, in order to compel them to favor their citizens and exempt them from certain obligations, or grant them privileges of any nature whatever."

And Cushing:

"As to the exceptions to the general rule, they have grown up chiefly in Spanish America in consequence of the unsettled condition of the new American Republics. Great Britain, France, and the United States have each, occasionally assumed, in behalf of their subjects or citizens in those countries, rights of interference, which neither of us would tolerate at home; in some cases from necessity, in others with very questionable discretion or justification, so as greatly to aggravate the evils of misgovernment therein, as will plainly appear on a careful study of the internal condition of the Spanish American Republics.

"It seems to me that considerations of expediency concur with all sound ideas of public law to indicate the propriety of a return to more reserve in all this matter, as between the Spanish American Republics and the United States; *that is, to abstain from applying to them any rule of public law which we do not admit to have applied to us; to do only as we would be done by; and to consult their well-being and cultivate their friendship by adhering to the impartial assertion, whether in claim or in rejection of claim, of the established rules of the international jurisprudence of Christendom.*"

In view of so numerous and creditable opinions, the conclusion *that the principle of the non-responsibility of States for the losses and damages suffered by foreigners in times of internal trouble or civil wars*, is the true principle of international law, applicable to Venezuela in the case of the Apurito conflict, seems wholly warranted by truth and justice. International relations cannot properly exist but between sovereign and sovereign; that is, between individuals of the same species, equal in independence. Before the law of nations all nations are equal, and if the wish of the powerful ones to cultivate relations of justice with the weak is sincere, and if the time and thought and labor, which they devote to foster relations of friendship and commerce with them, is with a view to valuable returns, they must behave toward them as they behave toward each other.

Summarizing, with regard to all the points of view from which this case has been considered, the claimants have failed to establish their right to be indemnified for the alleged losses and damages suffered by them in consequence of that regrettable conflict; and while this inference is true, in general, as to all of them, it seems to be so still more, in particular, with respect to Ralph Rawdon, as representative of "The Orinico Steam Navigation Company."

Firstly, because the tarrying of the steamer at Apurito, on her way to Nutrias, which may be regarded as the proximate cause of the said conflict, was in the interest of the company.

Secondly, because according to the charter of the Company "the officers and troops of the Government and articles of cargo of whatever kind they may be, belonging to the

Government, shall likewise be transported in said steamers at reasonable prices for passage and freight, to be agreed upon with the competent authorities." Whatever the influence of the presence of General Garcia and his officers and troops on board may have been in bringing about the conflict, this was a peril to which the company had voluntarily subjected itself, as per article 10 of its charter. As to the doubt, whether such obligation was extendible or not to the transportation of officers and troops belonging to the governments of the States, the fact of Captain Hammer having agreed with General Garcia upon his passage and that of his officers and men on terms conformable to said obligation, seems to have resolved it in favor of Venezuela. If it is not so, that question should have been determined by the authorities and according to the laws of Venezuela, in compliance with article 12 of the said charter, and should have never been the subject of an international claim.

Consequently, I am of the opinion that these four claims of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole, and Narcisa de Hammer, should be decided against the claimants.

In deference, however, to the judgment of my colleagues, I will sign an allowance for $5,000 each in cases No. 28 and No. 29, in addition to the amounts the claimants have already received therein.

LITTLE:

I cannot subscribe to all the reasoning of Mr. Commissioner Andrade.

The question of citizenship here is not a federal or municipal one. Inasmuch as the legislation of the two countries on this subject does not conduce to the same result in this case, that of neither can be looked to as determinative of the issue. This must be resolved from the stand-point of the public law. Thus considered, I think Mrs. Hammer and Mrs. de Brissot are not citizens of the United States, within the meaning of the treaty (Shanks *v.* Dupont, 3 Peters, U. S., 243).

Their claims must, therefore, be dismissed for want of jurisdiction. This, of course, is not saying that the United States has no cause for reclamation on the account of the killing of her citizens, Captain Hammer and Mr. de Brissot. It is only holding that under the terms of the convention the question is not submitted to us. It would be to go beyond the limits of just interpretation and to enter the forbidden domain of judicial legislation to say that "claims *on the part of* citizens" means or includes "claims growing out of injuries *to* citizens."

It is true, there is not wanting in the diplomatic correspondence evidence of assertion that these claims fall within the jurisdiction of the Commission. Such correspondence, however, is but the expression of a part of the treaty-making power. The treaty is the production of the executive and legislative departments of each country, and the opinion of one of these respecting its scope and meaning, while, as elsewhere observed, entitled to the highest respect and consideration, is not conclusive.

The other two Orinoco cases remain to be disposed of upon their merits.

The evidence does not show nor history chronicle that

there was a state of war in Venezuela at the time of this disaster. The occurrence cannot be viewed, therefore, from that stand-point.

The ultimate responsibility of Venezuela for these wrongs is in nowise dependent upon her form of Government, or the domestic distribution of her powers. For redress of injuries done her citizens, the United States must look to Venezuela, and not to any of her political subdivisions.

The question then is: Wherein and how was Venezuela derelict in duty, if at all, in respect of this tragedy?

The theory that Gen. Garcia unlawfully or unwarrantably boarded the *Apure* with his troops, took military control of the boat, precipitated the attack at Apurito, and held the non-combatants on the vessel in the fight, is not only not supported by the evidence, but against its decided weight. If these claims depended upon the establishment of any thing like such a state of fact they would have to be dismissed, for the facts and circumstances point quite to the contrary.

Garcia's embarkation was lawful and without coercion.

The attack at Apurito was a surprise to him as much as to the master of the vessel. The simple truth seems to be that he disembarked his little squad of militia in the dark in an ambuscade of conspirators to hunt down and suppress whom, not improbably, he had started, and got this far on his trip up the river, though he is spoken of as being on a tour of observation. They bided their time, waited till the vessel was fastened, to prevent his escape, and then, on the appearance of his force, opened fire. The confusion and demoralization of his troops under the circumstances is not strange, or attributable to any fault of his. The criminals were the conspirators upon the shore.

Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties.

If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without

entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well directed effort of that kind, or had the Government's investigation disclosed their innocence, and failed to discover those actually guilty, its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one.

But neither of these things appears to have occurred. It is true the evidence is not full and clear on this point. There is consequently some doubt about it. On the whole, however, considering the heinous character of the offence, it may fairly be said that Venezuela here fell short of her entire duty. And such may perhaps be inferred to have been the view, from acts and declarations, of her Executive and Congress. But her failure was not flagrant, and the allowance should be tempered with the doubt.

The damage to the vessel was not great. The consequential damages claimed by the company are not satisfactorily shown, if indeed they are not too remote. It is difficult to believe that this company, which had endured the storms of civil war for 15 years after its formation and entrance on business, was driven from the Orinoco by this one calamity, tragic and appalling as it was. Stackpole's injury was not disabling or severe.

The allowances should not, however, in such a case, be confined to actual losses. The violated majesty of the law and regard for human life should have consideration.

Remembering that the sum of $12,000 has already been paid the widows to whom we can grant no relief and who of course were the greatest sufferers, we have concluded to allow $5,000 without interest in each of the two cases in addition to what has already been received. The entry may, therefore, be for $20,000 in case No. 28 and $7,250 in case No. 29, less what has been received under the former treaty.

FINDLAY:

I quite agree with Commissioner Andrade that Mrs. Hammer and Mrs. de Brissot cannot be considered citizens of the United States invested with the right of prosecuting a claim against the Government of Venezuela. There is no evidence in the record that either of these ladies was ever in the United States, and it seems to be conceded that both of them were natives of Venezuela, where they were domiciled at the time of the injury which is made the subject of this reclamation. Citizenship of the United States, therefore, can only be claimed by virtue of the law of that country which declares that foreign women married to citizens of the United States and their offspring shall likewise be citizens of the United States.

The question in the case is, whether this law can have an extra-territorial operation and effect against the will and policy of another country, in which the persons, in whose behalf it is invoked, are and have always been domiciled since their birth; and, in my opinion, there can be but one answer to that question. Whatever rights the United States has in its power to bestow will unquestionably pass under the law establishing the status of citizenship in favor of non-resident aliens, including the right to take property by descent and succession, and the right to prosecute any claim against the United States; but more than this cannot be done, without interfering with the rights of other states, and involving them and herself in conflicting claims of the most absurd character. Children born of a marriage by a citizen with an alien are citizens also under this law; and now suppose that these were claims of the sons of Captain Hammer and Brissot, instead of their widows, and constituted a fit subject for reclamation by the United States or the Government of Venezuela, and that the United States had to resort to war in order to enforce the claims, what would ensue? On

the one side we should have, perhaps, the claimants themselves drafted into the military service of Venezuela, for the purpose of resisting the United States in enforcing the claims of her citizens, and on the other, the army and navy of that country spilling its blood and wasting its resources in an endeavor to establish a right in favor of the very persons who were opposing her efforts with arms in their hands. A citizen ought to have but one political status, and, in my opinion, the law of the United States which is appealed to as conferring upon the claimants the requisite character to give them a standing before the Commission, creates a mere municipal civil status which, by the necessity of the case, must be limited to such matters as are clearly within the jurisdiction of the United States. At the same time I can see no reason why a citizen of the United States should be murdered under circumstances which would make a foreign country responsible, and yet there should be no redress. The injury in such a case is to the country whose citizen or subject has been killed, and provision should be made for indemnity to the country, or as stated by Commissioner Little, the terms of the submission could be so drawn as to clearly include injuries to citizens, instead of being confined, as under the present convention, to claims of citizens. On the whole, I think that we have no jurisdiction as to these particular claims. After reading the record and carefully considering the arguments, which have been very full and exhaustive, on both sides, it does not seem to me that any case has been made out against Venezuela, except that she did not go as far as she ought in bringing the offenders to justice.

She surely had no means of knowing or anticipating such a murderous outbreak as that which occurred at Apurito.

As I understand the testimony, General Garcia and his detachment of troops on board the *Apure*, were entirely unprepared to meet the assault; and whatever may have been their expectations as to trouble somewhere on the route, certainly do not appear to have apprehended any difficulty at this

particular point. The attack was in the nature of an ambuscade and complete surprise. It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot, had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offence, or some honest endeavor made for his arrest and punishment.

I cannot accept the theory of war as affording an excuse for Venezuela in this case. Of course, if war existed, it would not be worth while to inquire further for in such a state there is but one law recognized, and that is the law of force, meliorated and modified somewhat in actual practice by the more refined and humaner instincts of modern times; but still, in its ugliest moods, the assertion of a power which recognizes no right superior to the doing and the appropriating of whatever is necessary to success. Had such a condition of belligerency existed, it could not be claimed that the attack upon the *Apure*, having on board a battalion of the enemy, was not justified by the laws of war, although civilian passengers happened to be on board at the same time, and the assault partook of the nature of an ambuscade, and was made under cover of the night; but where is the evidence that a state of war existed?

As I read the record, General Garcia, then president of Apure, started out from San Fernando with a small body of troops on a tour of observation. He only had fifty men in all, and with such a force it is apparent that the resistance which he expected to overcome, whatever it was, could not have been very formidable.

It appears that he took small boats with him, and that would indicate an intention to explore some waters, tributaries to the Orinoco, which were not navigable by the steamer.

The record is not clear, however, as to the object of his expedition, but as I understand it, fails entirely to disclose any evidence of a state of war, such as could be accepted as an excuse for the attack which ensued. It was urged in argument that the conditions were somewhat similar to those the United States was confronted with by the insurrection in the Southern States; but there is a wide difference between the cases. The South, as it was called, was a recognized belligerent *de facto* government, beyond the jurisdiction and control of the United States for the time being, and for this reason the United States could not be held responsible to foreign powers for acts done by the Confederates; but in this case Zamora occupied no such status, and besides Apure, in my opinion, cannot, with respect to Zamora, be placed in the same relation as the United States with the Southern Confederacy. The Constitution of the United States of Venezuela, adopted in 1864, has been quoted by Commissioner Andrade for the purpose of showing that Venezuela was really composed at this time of a number of separate independent States, each autonomous and supreme as to all matters of internal jurisdiction, and only related to a common Federal head, through the Fiscal and War Departments.

He says in the very learned and elaborate opinion which he has filed, that Apure was, in effect, a sovereign independent State, although an integral part of a body composed of several other States, equally sovereign and independent, called the United States of Venezuela, governed by a central administration, which was limited, however, to the power of making war and to the collection of revenues necessary for this purpose and the general welfare, and that under this decentralized system which was created in fact as the result of the long contention between the Unionists and their antagonists for the express purpose of embodying and giving effect to the Federal, as opposed to the national, idea of government, Apure was responsible for whatever was done by her au-

thority, and Venezuela must be exonerated. To this notion of Venezuela and her exterior responsibility, I cannot give an assent for a moment. Not only do I regard the question as closed by the principles laid down in the case of the *Caroline*, but if it was to be deemed as *res nova*, I should have no difficulty whatever in holding that whatever may be the relations *inter sese* between the constituent parts of a Federative body, admitted as such into the family of nations, they can play no part in determining the liability of the body by its own distinctive name to other nations for wrongs inflicted by any of the parts or within the domestic jurisdiction of the same.

Apure has no flag recognized among the national flags of the world; she has no power to make war on other nations; she can make no treaties, and she can break none; and as far as her relations with foreign powers are concerned her existence is completely veiled in the sovereignty of the United States of Venezuela, which, by the necessity of the status, must be responsible in any proper case for whatever is done within the limits of its jurisdiction. Conceding then that Zamora was in revolt against Apure, and the insurrection had swollen to such a head as to relieve the parent State from responsibility, still, in my opinion, other things being equal, Venezuela could not be excused because Apure was not liable, but only because she was not responsible herself. There are nine States in Venezuela, and if the doctrine of the learned Commissioner is accepted, instead of looking to one responsible head for redress for international wrongs, the State seeking a remedy would have to look to these different sovereignties, according to the particular jurisdiction within which the offence may happen to have been committed. As these matters are usually attended to by the diplomatic representatives accredited to the country, in what capacity would the Minister of the United States to Venezuela address the Government of Apure, for instance?

How would the State Department conduct the corre-

spondence? And if redress was refused, against whom would reprisals be taken or war declared, in any case of sufficient magnitude to justify such extreme measures? Could the rest of Venezuela be at peace while Apure was engaged in war with a foreign power asserting the rights of its citizens? These questions answer themselves, and I can never assent, therefore, to the doctrine, that as between the members of the family of nations, any third party can be recognized and treated as responsible for an international offence, simply by reason of its internal relations to some Federal head.

Claim of

WM. H. ASPINWALL, Executor of G. Howland and others,
v.
THE UNITED STATES OF VENEZUELA.

No. 18.

[Dissenting Opinion—Filed September 1, 1890.]

ANDRADE:

"There is no question, from the showing here, that, in their origin, these bonds pertained to citizens of the United States. The great bulk of the 5 per cent. Colombian domestic debt of which they formed a part, had as its basis indebtedness for military and other supplies. In their letter to the Secretary of State, August 15, 1857, the claimants speak of this kind of obligations as 'founded upon considerations of the highest character.' It seems quite probable, as claimed in the oral argument, that the Colombian bonds *were issued to the New York firm in payment for merchandise*, though at what rate does not appear" (Little, for the Commission, page 318).

For me, on the contrary, it is most questionable that, in their origin, these bonds did ever pertain to citizens of the United States.

Public debt is that which the Government contracts to meet the obligations of the State, whenever the ordinary and permanent resources are not sufficient, borrowing money at a fixed interest, that rises or declines in direct ratio with the circumstances; that is to say, the rating of credit that the Government enjoys. This means to provide for the expenses of the nation constitutes what, on the subject of national finance, is called by statesmen and economists "public loans," which, aside all considerations of an economical character that we have not to deal with here, are of general use and practice among all the governments of the world.

Public loans are *voluntary* or *forced;* it is unnecessary to rest to explain which constitute the former and which the latter; both define themselves.

They are reimbursable within a shorter or longer period,

or *non-reimbursable* or *perpetual.* In regard to the former, the Government pays the interests every year, or semi-annually, or quarterly, and sometimes monthly; and it refunds the principal totally or partly, all at once, or by successive instalments, at a fixed or at an undertermined time.

The loans can also be for a *real* or for a *nominal* capital; for a *real* capital when the Government recognizes itself as debtor of the amount received, and for a nominal capital when it declares itself debtor of a sum partially imaginary. In the former, the capital is fixed, but the interest may change; in the latter, on the contrary, the interest is fixed and the capital variable; that depends on the higher or lower rating of the credit of the Government.

There are loans by *adjudgment* and loans by *subscription.* In the former case, the Government admits the different propositions from bankers and accepts the most favorable; in the latter case, it establishes the conditions and negotiates with everybody.

As to the guarantee pledged to the creditor, they are divided in *mortgaged* or *bonded loans* and *non-bonded.* In the former, some property of the nation or the proceeds of some revenue are pledged; the others are raised on no other security than the confidence in the credit of the State.

Respecting *the origin* of the capital realized, public loans are divided in *foreign* (exterior) loans, the evidences of which are issued *in favor of foreign capitalists*, and *domestic* or *internal*, the evidences of which are issued *in favor of national capitalists.*

The different manners of contracting a public loan engender different kinds of debt.

When the Government wants to provide at once for immediate needs, and finds itself short of revenues on account of the ordinary revenues having failed to come in in time, or on account of the expense having not been foreseen, or it having to advance the same, issues *Treasury bonds* that bear an interest and are reimbursable within a certain time. The

Treasury bonds are just like bills of exchange payable at the Treasury at their maturity, whence the *floating* debt, so called, because of its being transient, occasional, and changeable. This operation of credit does not constitute a regular loan, it being only a mere advance of funds, or a simple discount of the proceeds of the public revenues.

The *consolidated debt* includes all those loans definitely settled or liquidated, and for the extinction and interests of which appropriation is made in the ordinary budget of the State. It is sometimes named *inscribed debt* also, because it is inscribed or recorded in the *Great book of the public debt.* It is divided in *redeemable* and *irredeemable.*

These are elemental scientific notions to be found in all books on political economy.

Colombia, during her war of independence, was frequently necessitated to contract debts, abroad as well as at home, for the liquidation of which she began to provide by a legislative act of her first Congress.

"The general Congress of Colombia, considering: the honor of the Republic being interested in the early recognition and satisfaction of the debts contracted for the glorious cause of her independence, * * * decrees what follows:

"ART. 1. A commission is hereby created for the purpose of liquidating the national debt" (Decree of October 12, 1821).

The state of the liquidation accomplished by the Commission, up to 1826, together with new provisions for the prosecution thereof and for the satisfaction of the national debt, is shown in the law of May 22, of said year, intended to lay the basis of the national credit:

"ART. 1. The Republic of Colombia recognizes as national debt: 1. The sum of 2,000,000*l.* sterling, which Francisco Antonio Zea contracted for in Paris, in the name of the Republic, in March, 1822, reserving the rights that may pertain to the Republic, against all whom it may concern, in consequence of the liquidation thereof ordered by the law of July 1, 1823.. 2 That of 4,750,000*l.* sterling contracted for at Calais on April 14, 1824, by Manuel Antonio Arrublas and Francisco Montoya. 3. The one already examined and liquidated by the commission of liquidators, established in this capital, and which, up to the present, amounts to 1,181,407 pesos four reals and

seven-eighths; and that which shall continue to be examined and liquidated by the said Commission in uniformity with the law of the matter. 4. That of 814,710 pesos, which has been contracted, and is unpaid, in virtue of the loan decreed by the law of July 26, 1823, year 13, to cover the military credits of the troops and officers of Apure; and that which is still to be contracted for the exact fulfilling of the said law. 5. The sum still owing of the 5,458,-600 pesos of military credits, which, according to the law of September 28, 1821, year 11, has been awarded to the servants of the Republic, and what else may be hereafter awarded in pursuance of the same law. 6. That which may exist unpaid of the one-half of the salaries of civil and military officers of the Republic, retained in compliance with the decree of the President Liberator, of September 14, 1819, of which the Secretary of the Treasury shall give an account to the coming Congress at its first session. 7. The amount of the third part of the salaries of the same class of officers, retained according to the law of October 8, 1821, year 11, of which amount the Secretary of the Treasury shall also present an account to the coming Congress at its first session. 8. The amount of the annuities allowed or transferred during the several periods of the revolution, by the Republican Government, payable at the several provincial treasuries of the former New Granada and Venezuela, and of which the Secretary of the Treasury shall render account to the next Congress at its first session. 9. That which was acknowledged and guaranteed by the act of independence of the Isthmus of Panama, after being examined and liquidated by the commission of liquidators established in this city, and which a statement shall also be presented to the next Congress by the Secretary of the Treasury.

"ART. 2. It is declared: 1. That *the foreign debt mentioned in Nos.* 1 *and* 2 of the foregoing article has earned and shall continue to earn the annual interest of *six per cent.* stipulated in the respective contracts, and shall be redeemed as agreed therein. 2. That those (sums) *mentioned in Nos.* 3 *and* 4 which have earned *five per cent.* annual interest from the day they were contracted, shall continue to earn the same interest hereafter; but those included in No. 3 which have earned a lesser interest, or none at all, shall earn in future five per cent. yearly from the day of their inscription in the great book of the national debt. 3. That those mentioned in Nos. 5, 6, 7, 8, and 9 shall earn a premium of three per cent. annually from the 1st of July of the present year of 1826.

"ART. 9. The Congress shall keep *a great book of the national debt*, which shall have for its heading a full copy of this law, signed by the presidents and secretaries of both houses. (Art. 8.)

"In that book shall be inscribed the several sums, which by this law are acknowledged as national debt, and all the inscriptions thereof shall be signed by the presidents and secretaries of both houses. The formula shall be as follows:

"*The Republic of Colombia acknowledges as national debt the capital sum of ——— pesos, resulting from ——— and approved by ———, to which the annual interest of ——— per cent. is allowed, payable every six months, out of*

the funds applied thereto by the law of ———, and out of such other funds as may hereafter be applied to the said end.

"ART. 18. The commission of the national credit shall call in all the obligations of *the home debt* emitted by the Treasury Department up to this time, *all the certificates for military credits* issued by the chief commission sitting in this capital, and *all the certificates for salaries withheld*, approved by the Secretary of the Treasury; and sealing again all these documents in order that they may remain cancelled, in lieu thereof and in accordance with this law, it shall emit obligations with interest, payable to bearer, showing the annual rate of interest.

"ART. 19. These obligations shall be for 25, 50, 100, 200, and 500 pesos." * * *

It will be noticed from that law that Colombia, in accordance with the economical rules generally adopted, divided her total national debt in two principal portions: *the foreign debt* entered into with *foreign capitalists* (Nos. 1 and 2, Art. 1), and the *home or domestic debt* contracted with *national capitalists* (Nos. 3 to 9). That the foreign debt earned *six per cent.* annual interest, and the home debt *five per cent.* (No. 3 and 4) or *three per cent.* (Nos. 5 to 9). That all the sums resulting from the several sources of the national debt should, after liquidation, be entered in the "great book of the national debt," that is, *consolidated* under a certain formula. That obligations for 500 *pesos* bearing 5 *per cent. interest*, could only be emitted in lieu of *the former obligations of the home debt* issued by the Treasury Department, and of *the certificates of military credits* issued by the commission of liquidators created in 1821, that is, in evidence of the items described in Nos. 3 and 4 of article 1 (articles 2, 18, and 19).

The Colombian obligations held by the Howlands in 1839 were, as it appears, for 500 *pesos* bearing 5 *per cent.* interest, and therefore represented a portion of the *home debt* contracted with *national capitalists*, and could not have been emitted *originally* in their favor, because they were foreigners, citizens of the United States, not naturalized or domiciliated in Colombia; had not had any property taken or destroyed there during the war; had not lent any money to

the Government; had not been civil or military officers of the Republic; in short, were on no account *original*, *direct*, *domestic creditors* to Colombia. Nor is it probable that such obligations were issued to the New York firm in payment for merchandise. Colombia did never cancel with bonds of public debt her obligations toward foreigners, arising out of contracts for military or other supplies. She used to pay, therefor in money, bills of exchange on Europe, treasury notes, tobacco, etc., as the majority of the Commission had the oportunity to note in the case of Idler; never in bills of public debt, either internal or external. The words quoted from their letter to the Secretary of State, August 5, 1857, refer to the obligations of Venezuela towards Colombia, not to the Colombian bonds. Those words would seem rather to exclude the probability of their having acquired the bonds in that way, it being inconceivable that any cause of a mercantile nature could be properly qualified as a consideration of the *highest character;* such a style is acceptable only in connection with moral or intellectual considerations. But if they had, they should prove it; because both the usages and the history of Colombia testify against that fact. No; the bonds here contemplated did not pertain *in their origin* to the Howlands or to any other citizens of the United States. They could not have come into the possession thereof but by purchase in the market in the way of speculation. Those bonds were not *international debt.*

In 1830, Colombia was severed into the three independent States of Venezuela, New Granada, and Ecuador, and on December 23, 1834, a treaty was concluded in Bogota, between the plenipotentiaries of the Governments of Venezuela and New Granada for the settlement of all matters concerning the *active and passive debt* which they and that of Ecuador had contracted in common, and recognized while forming the Republic of Colombia. For this purpose, the appointment of a commission was provided for, composed of three ministers or representatives, one for each Republic (Art. 24). The

division was agreed to be effected in the proportion of 50 per cent. for New Granada, 28½ per cent. for Venezuela, and 21½ per cent. for Ecuador (Art. 1). In consequence of this agreement, Venezuela became responsible for 570,000*l.* sterling out of the Paris loan of 1822, and for 1,318,395*l.* 15*s.* of the Calais or Hamburg loan of 1824, which aggregated the whole of the foreign debt of Colombia (Arts. 2 and 3).

With respect to the domestic debt, Venezuela obligated herself to recognize as Venezuelan debt the sum of 1,977,896 *pesos* 37 cts. of the 3 per cent., and 1,527,416 *pesos* of the 5 per cent. Colombian *consolidated* debt (Arts. 9 and 10). But the domestic debt not being yet, at that time, totally consolidated (Art. 14), these figures are only temporarily established here, and subject to rectification.

"ART. 16. As soon as the acknowledgment of the total amount of the debt be accomplished, the commission shall proceed to divide it among the three Republics in conformity with the basis fixed in Article 1 of this treaty, *adjudicating, in preference to each of them, the debts pertaining to her own citizens or inhabitants.*

"ART. 12. After the exchange of the ratifications of the present treaty, the Governments of the three Republics shall proceed to convert the national consolidated debt of Colombia into debt of their own for the sums to be respectively recognized by them, causing the Colombian bonds to be collected and cancelled according to the rules enacted by their several legislatures; this done, the bonds shall be remitted to the Commission of Ministers of the three Republics sitting at Bogota, for the verification and destruction thereof."

In pursuance of the said treaty, a law enacted by the Congress of Venezuela in May, 1837, provided:

"ART. 3. The amount of 1,806,763 *pesos*, 3 per cent. consolidated debt, and that of 1,395,091 *pesos*, 5 per cent. consolidated debt ascribed to Venezuela, as per the partition agreed to in the treaty above mentioned, deducting the sums redeemed from January 1, 1830, heretofore; also the amount of the interests due on said capitals and of those which may become due henceforward; that of 456,958, consolidable debt, according to the law of May 22, 1826, which approximately will be apportioned to Venezuela on completing the partition of this Colombian debt, deducting that which has been redeemed since January 1, 1830, shall be paid out of the following supplies." * * *

The foregoing law was included in that of April 26, 1838, which provided:

"ART. 2. The amount of 1,806,763 *pesos*, 3 per cent. consolidated debt, and that of 1,395,091 *pesos*, 5 per cent. consolidated debt, ascribed to Venezuela, as per the partition agreed to in the treaty above mentioned, deducting the sums redeemed from January 1, 1830, heretofore; also the amount of the interests due on said capitals and of those which may become due henceforward; that of 456,958 *pesos*, consolidable debt, according to the law of May 22, 1826, which approximately will be apportioned to Venezuela on completing the partition of this Colombian debt, deducting that which has been redeemed since January 1, 1830, shall be paid out of the following supplies:

"1. The residue of tributes, taxes, and duties of whatever description collected up to June 30, 1831.

"2. The residue of the tithes collected before the extinction of said revenue, without prejudice to the creditors thereof, according to the provisions of the law of February 12, 1836.

"3. The debt of the tobacco farmers, with all the actions and rights of the said revenue.

"4. The personal and real estate of the national patrimony, which may be sold according to the law of the matter.

"5. The public lands which may be sold in accordance to the law.

"ART. 4. *Creditors for consolidated debt, as contemplated by the law of May* 5, 1837, *and for that which may be consolidated in virtue of Article* 6 *of the present law, shall be paid the annual interest of* 5 *per cent., since July* 1*st of this year, every three months, in the first fortnight of October, January, April, and July.*

"ART. 5. *For the payment of this interest and the gradual redemption of the capital,* 50,000 *pesos of the receipts of the custom-houses shall be appropriated.*

"ART. 6. *The consolidated debt of Venezuela shall not exceed the capital sum of* 500,000 *pesos; but the Executive shall issue bills on that account, so as to keep the said sum always full during the existence of the kinds of internal debt mentioned in Article* 2, *which are hereby declared 'consolidable,' at the option of the holders, under the following rules:*

"1. The holder or holders of the promises or documents referred to, shall make offers to the Economic Treasury Board in Caracas, either directly or through the Governors of their respective provinces, in order to have their promises of consolidated or consolidable debt of Colombia converted into consolidated debt of Venezuela.

"2. The board shall accept in preference those proposals by which the largest amount, in promises or documents of the debt of Colombia, be offered, until covering the sum of 500,000 pesos fixed as maximum in this article; and shall give the Executive notice of the proposals received and of those accepted by it, in order that, while receiving and cancelling the bonds of Colombia, it may *emit and surrender corresponding the bills of Venezuela.*"

"3. *The board shall consider as equal the amounts offered by the holders, either belonging to capitals of any of the three kinds of debt mentioned in article* 2, *or to the interest due and not paid on the two first kinds bearing interest.*

"ART. 7. *For the conversion of the debt of Colombia into the debt of Venezuela, bills of credit payable to bearer shall be issued for, from* 50 *to* 1,000 *pesos each, as the creditors may require them; as to amounts under* 50 *pesos, bills shall be issued for the total sum owing.* * * *

"ART. 10. *After the interest being paid, the surplus of the amount appropriated by article* 5 *shall be applied to the redemption of the principal. This shall be made by dividing the amount into portions of* 100 *pesos each, which shall be put up at public auction and shall be given to the bidder of the largest sum in bonds of those referred to in this law, provided that the nominal value of the bonds offered be not inferior to the portion proposed.*

"ART. 11. *The auction shall be made in the capital of the Republic, in the presence of the Economic Treasury Board, within the ten days following those appointed for the payment of interest.*

"ART. 16. *The holders of documents of the debt of Colombia who will not convert it in conformity with this decree, shall have the rights preserved, which they have acquired respecting the form and date of payment; but those who will desire and obtain the conversion shall not have other rights than those which this law gives them by articles* 4 *and* 10.

"ART. 17. *If in consequence of the arrangements which have been ordered to be carried out by the Commission of Ministers at Bogotá, the amounts of each class of debt apportioned to Venezuela be altered, by way of compensation of the ones for the others, the Executive shall admit to the conversion larger or smaller amounts according as to the alteration made in Bogotá.*"

The law of April 26, 1838, was additioned by that of May 10, 1839, as follows:

"ART. 1. As soon as the Executive be cognizant of the total amount of the debt of Colombia, it shall proceed, subject to the provisions of the Treaty of December 23, 1834, concerning the partition of the said debt, and to the subsequent arrangements made by the commission of ministers sitting at Bogota, to convert into Venezuela's own debt the part apportioned to this Republic according to Article 1 of the said treaty.

"ART. 2. The debt converted into Venezuela's own debt shall be represented in bills authorized by the commission of public credit, following the models which the Executive shall make with all proper precautions against counterfeiting, *and shall bear the name of consolidable debt of Venezuela.*

"ART. 3. *From the date of the issue of the bills referred to in the preceding article, no others shall be admitted to the conversion into consolidated debt of Venezuela, spoken of in the law of April* 26, 1838, *on public credit.*"

The law of May 10, 1839, was followed by several others relative to the same subject of the conversion of Colombian debt into consolidable debt of Venezuela, and of this into consolidated debt of Venezuela, namely:

Law of April 11, 1840:

"ART. 1. The Executive shall convert into *consolidable debt of Venezuela* the sum of 88,745 *pesos*, 4 cents of 5 per cent. consolidated of Colombia, and the sum of 53,872 *pesos*, 10 cents, growing out of interest acknowledged by the said Republic, in order to complete therewith the amount which has been apportioned to Venezuela in the final partition of the domestic debt of Colombia."

Decree of April 28, 1840:

"ART. 1. In order to convert the sum mentioned in the foregoing law, composed of 88,745 *pesos*, 4 cents, 5 per cent. Colombian consolidated debt, and 53,872 *pesos*, 10 cents, interest acknowledged by the said Republic, the holders of promises of either kind shall present them to the commission of public credit, from the date of this decree to the 30th of June next."

Law of April 15, 1840:

"ART. 1. The Republic of Venezuela acknowledges as *domestic national debt* the sum of 500,000 *pesos* aggregating the consolidated debt of Venezuela at five per cent. interest per annum; and, besides, that which is still owing of the 7,217,915 *pesos and* 12 *cents*, capital apportioned to her by the commission of ministers assembled at Bogotá, for her 28½ per cent. of the *domestic debt* of Colombia, in the following manner: 1,337,043 *pesos* and 60 cents, consolidable and consolidated debt at 5 per cent. interest per annum; 2,188,206 *pesos* and 51 cents, floating debt, with its interest as stated in the respective documents; 2,781,040 *pesos* and 29 cents, consolidated and consolidable debt, at 3 per cent. annual interest; 66,386 *pesos*, 75 cents, floating debt without interest; 764,953 *pesos*, 59 cents, treasury debt, without interest; and 80,274 *pesos* and 37 cents arising from acknowledged interests unpaid.

"ART. 2. *The holders of promises of consolidable debt of Venezuela, originating in the* 3 *and* 5 *per cent. consolidable debt, as well as in the* 3 *and* 5 *per cent. consolidated debt of Colombia, shall continue to earn in future the same annual interest of* 3 *and* 5 *per cent., and are entitled to the interests earned by their credits, according to circumstances, as per the law of May* 22, 1826.

"ART. 3. *For the payment of the interests on the consolidated debt of Venezuela, and gradual redemption of the capital and interests on the whole domestic national debt,* 50,000 *pesos are appropriated, which shall be disposed of subject to the rules to be given in Articles* 4 *to* 9.

"ART. 4. Creditors on account of the *consolidated debt of Venezuela* shall be paid in money the interest of 5 per cent. per annum, and this payment shall be quarterly in the first fifteen days of the months of January, April, July, and October.

"ART. 5. After paying the interests on the *consolidated debt*, the *rest of the sum named in Article* 4 *shall be applied to the redemption of its capital. This shall be effected by dividing the sum in portions of* 100 *pesos each, which shall be put up at public auction, and shall be given to the highest bidder of the bills mentioned in this law, provided that the nominal value of the capital* (*bills*) *bidden be not below the portion proposed.*

"ART. 9. *The consolidated debt of Venezuela shall not exceed the capital of* 500,000; *but the Executive shall issue bills of this debt, so that the said capital be kept always full, so long as the kinds of internal debt mentioned in Article* 1, *may exist, which shall be consolidated at the holder's option according to the following rules:*

"1. The holder or holders of the promises or documents above mentioned, shall make offers to the Economic Treasury Board, in Caracas, either directly or through the Governors of their respective provinces, in order to have their debt converted into *consolidated debt of Venezuela.*

"2. *The board shall accept in preference those proposals by which the largest sum be offered in promises or documents of the consolidable debt, until reaching the amount of* 500,000 *pesos fixed as maximum in this article; and shall give the Executive notice of the proposals received and of those accepted by it, in order that while receiving and cancelling the consolidable promises, it may issue and deliver the corresponding bills of consolidated debt.*

"3. The board shall consider as equal sums those which may be offered to it by the holders, whether they arise from capitals of the debts mentioned in article 1, or from interests due, but unpaid, on those debts which earn interest."

Law of April 5, 1841:

"ART. 1. *The Executive is hereby authorized to issue bonds of consolidated debt, at* 5 *per cent interest per annum, for the amount of* 1,300,000 *pesos, with the object to convert thereto the consolidable debt under the terms which shall be indicated.*

"ART. 3. *The conversion shall be effected at the rate of* 100 *pesos, capital and interest, of consolidable debt, for* $33\frac{1}{3}$ *pesos of consolidated debt.*

"ART. 4. *For the payment of interest, and for the fund of redemption of the capital sum of* 1,300,000 *pesos consolidated debt, created by the present law, the amount of* 130,000 *pesos, which shall be inserted in the budget of expenses, shall be annually appropriated.*

"ART. 7. *Creditors unwilling to make the conversion of their credits under the terms offered by this law, shall continue to enjoy the rights conceded to them by the law of public credit.*"

Law of April 27, 1843:

"ART. 1. The Executive is hereby authorized to continue the issue of bonds of consolidated debt, at 5 per cent. annual interest, in order to convert thereto the consolidable debt which remained unconverted on June 30, 1842.

"ART. 3. The conversion shall be effected at the rate of 100 *pesos*, capital and interest, of consolidable debt, for $33\frac{1}{3}$ of consolidated debt.

"ART. 7. Creditors not desirous to have their credits converted under the terms offered by the present law, will continue to enjoy the rights granted to them by the law of public credits.

"ART 8 The consolidable debt not converted by the 30th of June, 1844,

may be converted at any time in accordance with article 3 of this law; but the interests already accrued and those which may accrue, up to the quarter year in which the conversion be effected, shall be capitalized and converted as provided by the said article 3 of this law; the interests of the debt consolidated in this wise shall not be paid in money, but from the quarter year following that in which the conversion be made.

"ART. 9. *Upon the total consolidable debt being consolidated, the sum of* 50,000 *set aside by the law of the public credit for the debt therein mentioned, and that of* 130,000 *pesos appropriated by the present law for the consolidable debt already consolidated, or which may be hereinafter consolidated*, shall constitute a single fund for the payment of interests and redemption of the whole 5 per cent. consolidated debt; and to this latter object all the sums shall be applied which may gradually become unnecessary for the payment of interests, in consequence of the progressive redemption of the capital."

Law of December 12, 1856:

"ART. 1. The Republic of Venezuela recognizes as national *consolidated* debt, of but a single inscription, bearing the same interest of 5 per cent. per annum heretofore assigned to it: 1. The *consolidated debt* actually in existence, by virtue of the laws of April 15, 1840, April 27, 1843, May 8, 1847, and April 18, 1853. 2. The Espera Treasury debt. * * * 3. All other credits originating in substitutions of the State. * * *

"ART. 3. The *consolidable debt in circulation, which may have been issued in accordance with the provisions of the law of April* 15, 1840, of the treaty with Spain, and of the legislative decrees of March 22, 1852, and March 10 and May 13 and 14, 1856, *may be converted at any time, at the option of the holders, into the consolidated debt recognized by article* 1 *of this decree, until, through the conversion, the maximum of* 500,000 *pesos shall have been reached.*

"ART. 4. The conversion of every 100 *pesos*, capital and interests, of the consolidable debt, shall be made for 33⅓ of the consolidated debt.

"ART. 9. For the payment of the interests on the consolidated debt, *there shall be included, annually, in the budget of public expenses up to the sum of* 250,000 *pesos.*"

Law of June 16, 1865:

"ART. 23. As national *consolidated* debt is recognized:

"1st. The amount of loans made to the authorities and military chiefs of the federation. * * *

"2d. The other securities of the internal debt which may be converted *at the will of the holders* and in conformity with article 26.

"ART. 26. The conversion into the national consolidated debt of the different debts comprised in article 23, will be made in the following terms:

"5th. The treasury bills issued without interest in conformity with the distinct regulations which have governed the matter; the *consolidable debts* and * * * will be converted at the rate of 100 *pesos* for 20 of the new debt.

"ART. 28. The verification and liquidation of the bills and credits which have to constitute the national consolidated debt, will be made according to the following general regulations:

'2. On each bill which is received for comparison and conversion will be noted on its back, under the seal and the signature of the Minister, that it is registered in the respective book of certifications, and it will be returned to the interested party, who will give a receipt on the counterfoil of the certificate, returning it. The certificates returned will be cancelled by the Secretary and will be filed in the archives."

Decree of June 19, 1865:

"ART. 8. Are subject to revision:

"1st. The credits which, according to the laws in force, were examined or liquidated *and have not yet been definitively recognized.*

"ART. 16. The bills and titles issued to bearer, *which have not yet been presented for comparison*, shall be presented to the Board of Public Credit with a statement signed by the presenter, showing distinctly the class of each debt or title, the series, names, folio, and value of each bill, and the number of coupons attached thereto.

"ART. 22. The bills of public debt and the bonds of the extinguished Bank of Venezuela *are required to have the note of comparison and to be resealed, in order to become admissible to the conversion of law.*"

Decree of July 1, 1865:

"ART. 1. The holders of bonds of public debt and other titles to bearer, to which the law of public credit refers, shall present them to the Board for their confrontation up to December 31 of the present year.

"ART. 5. The Republic shall not recognize as her own debt the bonds or titles to bearer, or credits of any kind whatever, which shall not be presented up to the respective date fixed by articles 1, 2, and 3; *nor shall be converted into consolidated debt the bills or titles to bearer or other documents of credit which shall be presented for conversion after the date fixed by the foregoing article.*"

Returning now to 1838, on the 15th of October, that year, the Howlands surrendered to the Venezuelan Government their Colombian bonds for their conversion into Venezuelan debt, and on September 15, 1839, they received from Venezuela the identical bonds proven in this case, and from that time the possession of the bonds and title therein have been in the claimants. But this is not enough to give them the right to have their claim taken into the cognizance of this Commission. United States citizens and corporations only may claim before it, and such citizenship must have existed

when the claim accrued. In the present case the claim is held to have had its origin in the Colombian bonds converted into consolidable debt of Venezuela, of which the Howlands, as shown, could not be and were not *original owners*, but *assignees or transferees;* and the conversion did not change their character as such, nor give them better rights than those of their assignors or transferers, who were not citizens of the United States. By the conversion the Colombian debt was assimilated into Venezuelan debt, not into United States substance. This claim does not come within the treaty under which this Commission sits.

My colleagues have been, however, of a different sentiment. Disregarding the nature of the transaction through which the claimants became the first takers of the Venezuelan bonds, and thereby led, perhaps, to misapprehend the *native character* of those bonds, they have taken jurisdiction of the case and decided it upon the assumption that the Howlands are therein *original creditors* of Venezuela. Upon this assumption, what would have been the rights of the latter? No other than those which the law of April 26, 1838, gave them by articles 4 and 10; that is, to be paid every three months the interest on their bonds, and after the interest being paid, to have the surplus of the sum of 50,000 *pesos* appropriated by Art. 5 applied to the redemption of the principal, by dividing the surplus into portions of 100 *pesos* each, and putting up these portions at public auction (Art. 16). But these rights were understood to be given only to creditors on account of *consolidated debt* of Venezuela, as explicitly stated in Arts. 4 and 5 of the law of April 15, 1840, which is to be regarded as the essential one in this respect, because it was that law which finally determined and recognized the true amount of the 28½ units of Colombian debt convertible into national debt of Venezuela, and precisely defined her obligations toward her creditors on that account. The laws of 1837, 1838, and 1839 were provisional regulations, adopted for the present need and

intended to give way to that of 1840; and all the provisions in this last law, as well as in all the others following it, for the payment of interests or of principals, distinctly refer to the *consolidated* debt. As to the *consolidable* debt, its right to be satisfied was, in possibility, capable of passing in act through its conversion into consolidated debt, not otherwise.

Venezuela promised to recognize as national debt of hers and to admit the validity of the 28½ per cent. of the Colombian debt at the time of the dissolution of Colombia, and that she did with all the forms of law, at all times, since 1837. She never promised in any form to pay, with interest, the moneys now claimed. Her *consolidable debt bonds*, like *the Colombian consolidated bonds* which she had received in exchange therefor, represented in their face a *nominal, partially imaginary*, not a *real* capital, and what she promised in regard to them was only, first, to consolidate them by public auction, and afterward to pay them also by public auction, thus attempting to secure the end, as far as possible, of paying only their *real* capital. Everybody familiar with this matter of public debt knows well that such is a usual method, with Governments, of relieving themselves of that kind of obligations. Therefore, the claimants' complaint, in 1855, of failure on the part of the Venezuelan Government to carry out in good faith the sinking fund law, supposing the existence of such failure, was not a just one on their own part, because their credit against the Government being still *consolidable*, they had not any right in the sinking fund appropriated exclusively for the *consolidated* debt.

There were two conversions contemplated in the law of 1838, to wit: Conversion of "consolidated or consolidable debt of Colombia" into "consolidable debt of Venezuela," and conversion of "consolidable debt" of Venezuela into "consolidated debt of Venezuela." The former was *optional* the latter *peremptory* so far as regarded the right in act, to payment in any form. The holders of documents of Colom-

bian debt, who would not convert them into "consolidable debt of Venezuela" had the rights preserved, which they had acquired in Colombia, respecting the form and date of payment; those who would desire and obtain the conversion should have no other rights than those granted to them by the said law in articles 4 and 10. The claimants preferred the conversion of their Colombian bonds into "consolidable" debt of Venezuela, and by that fact bound themselves to convert this debt into "consolidated" debt of Venezuela, as a condition of its payment, and accepted the rights, in possibility, offered to them by articles 4 and 10 of the law of 1838.

This right of conversion by public auction was secured to them through the subsequent legislation up to 1865, while from 1840 a second method of conversion, which was *optional*, was offered to them, consisting of a kind of private auction, in which the auctioneer was the Economic Treasury Board of Caracas (see law of April 15, 1840, Art. 9). All the holders of *consolidable* debt of Venezuela chose to convert by either method, except the claimants.

From 1841 to 1865 it was left to the option of holders of *consolidable* debt to consolidate it at the rate of 33⅓ per cent. All were willing to consolidate except the claimants.

In 1865 the rate of conversion was reduced to 20 per cent., always optionally to holders of consolidable debt; and all of these wished for the conversion except the claimants.

When the bills which are the subject of this claim were applied for and received by the Howlands, Venezuela declared in the most solemn legal form that they were not payable in money but after their *conversion into consolidated debt.* she made the conversion a condition *sine qua non* of their payment, and promised to provide the proper means for the performance of the condition, which was by "public auction." The Howlands accepted the bills as dischargeable peremptorily under that condition and by this means. Such was the contract.

Venezuela not only provided for the conversion through public auction, but supplied the Howlands, at their option, with other means to facilitate it, such as private auctions, or direct arrangements at certain fixed rates per cent. The claimants always resisted the conversion by any means. Who broke the contract?

My colleagues believe that the Government of Venezuela failed to carry out in good faith the sinking-fund law (it is supposed that they mean thereby the conversion law), and that "had the law, as it stood in 1839, been fairly administered, the claimants would have no right to look to other source of payment. But the difficulty is, that was not done. The contract was not fulfilled by Venezuela. The law was greatly modified to their prejudice and in violation of the understanding embodied in the legislation of 1838–'9, under which they acted. When the means of payment to which they had agreed to look was thus taken away or materially impaired, what in justice became their rights? They had exchanged their Colombian bills for these bonds, redeemable according to a prescribed method, on the faith that such method would be faithfully regarded and carried out."

My colleagues charge Venezuela with the fault, but without proving it; they do not show where and when was the law modified and violated. I do not find the charge supported by the facts at all. In my opinion it is only founded upon the letter of the claimants' agent, Mr. John M. Foster, to the American Minister at Caracas in 1855, and the statement of 1857 attributed to Mr. Henry S. Sanford. But the whole body of the legislation before cited and analyzed by me, subsequent to that of 1838–'9, bears testimony to the contrary.

In regard to the means of payment, they were not taken away or impaired in anywise; but had that been done, the rights of the claimants with respect thereto became none, absolutely none, because as already shown, according to the understanding embodied in the legislation of 1838–'9 under which they acted, the means of payment were only intended

for the *consolidated* debt, and the claimants' bonds were *consolidable* debt.

As to the method prescribed for the redemption of these bonds, on the faith of which the claimants had exchanged their Colombian bills, it was not less faithfully regarded by Venezuela as more than sufficiently proved, also by the testimony of said legislation. That method consisted, first, in the *consolidation* by "auction," and then in the sinking of the debt "so consolidated likewise by" auction, which the claimants did never wish for; they looked with all probability, but without light of justice, first to the consolidation at par and then to the redemption at par. According to all the laws forming part of their contract with the Government of Venezuela, they had no other source of payment than "consolidation," nor other source of consolidation than "auction."

But it is said that the Howlands were given the right *at will* to exchange their bills into consolidated debt at the best rate the market could allow, and afterward a less advantageous price was fixed at which the exchange should be made. This is another assertion that I do not find justified by the facts, and which probably rests only on some misunderstanding of the law. For me it is evident that there was not such right given them, but an obligation imposed upon them, which they should fulfil if they wished to consolidate their bills; and the means to accomplish that obligation, which was public auction, was never impaired by Venezuela. The rights left to their option were those of making direct offers to the Commission of Public Credit, and of exchanging their bills at the rate of $33\frac{1}{3}$ per cent. which, let it be said by the way, was not a less advantageous rate than that which had been obtained at the public auction.

It is also contended that the law of 1839, forming a part of the contract, provided that no other notes or bonds than the Colombian indebtedness therein referred to should be admitted to the conversion into consolidated debt of Venezuela,

and notwithstanding large amounts of other bonds and subsequently accruing debts were afterward admitted thereto, and on greatly better terms of exchange than that, which was an impairment of the supposed right of conversion.

By the law of April 5, 1841, the capital of the consolidated debt was increased from 500,000 *pesos* to 1,300,000 for the purpose of converting thereinto the consolidable debt, and 130,000 *pesos* yearly instead of 50,000 were appropriated for the payment of interests and fund of redemption. Can it be said that this was an impairment of the right of conversion?

The law of April 27, 1843, authorized the Executive Power to continue the issue of bonds of the consolidated debt bearing five per cent. interest per annum for the purpose of converting the consolidable debt, which had not been converted up to June 30, 1842. This law provided also that, "Upon the whole of the consolidable debt being consolidated, the 50,000 *pesos* set aside by the law of public credit for the debt mentioned therein and the 130,000 *pesos* assigned by the present one to the consolidable debt already converted or which may be henceforward converted into consolidated debt, shall constitute a single fund for the payment of the interests and redemption of the entire consolidated debt." * * * Here the sinking fund is increased up to 180,000 *pesos* without admitting to consolidation any other bonds or debts whatever. Was this an impairment of the right of conversion? Was it not, on the contrary, a facilitating the exercise thereof?

The law of April 18, 1853, provided as follows:

"The Republic acknowledges as national debt:

"1. The Treasury debt from July 1, 1846, to June 30, 1852. * * *

"2. The debt weighing upon custom-houses." * * *

The treasury and the custom-house debts are not "consolidable" but "floating" debt; it cannot be said that this was an admission of other debts to consolidation. Such admission did not affect the regular method of converting the

consolidable debt, nor the fund formerly appropriated for the satisfaction of the consolidable debt; new, especial fund was assigned for the payment of this debt hereby recognized. Besides, ten years had elapsed from 1843, and the consolidable debt arising out of Colombian debt was considered totally consolidated already and in fact was so, except only, perhaps, that of the Howlands. Can this be named an impairment to their right of conversion?

By the decree of December 12, 1856, the Republic recognized as national consolidated debt: (1.) The consolidated debt in existence at present, according to the legislation from April 15, 1840, to April 18, 1853. (2.) The Espera Treasury debt. (3.) All other credits originating in substitutions of the State for which Espera Treasury debt was to be emitted. (Art. 1.) The same law provided by Art. 3 that "the *consolidable* debt in circulation, which may have been issued in accordance with the prescriptions of the law of April 15, 1840; of the treaty with Spain, and of the legislative decrees of March 22, 1852, and March 10, April 24, and May 13 and 14, 1856, may be converted at any time, at the pleasure of the holders, into the consolidated debt recognized by Art. 1 of this decree, until, through conversion, the maximum of 500,000 *pesos* shall have been reached." Art. 1 of this decree refers to *consolidated* debt, not to *consolidable* debt, for the payment of the interest of which the sum of 250,000 *pesos* annually was appropriated. The kinds of *consolidable* debt referred to in Art. 2 were all Colombian debt not liquidated by the Commission of Ministers at Bogota, and which, like that represented by the bills of the Howlands, was entitled to be acknowledged as national debt of Venezuela. Was this an impairment of the claimants' right of conversion?

By the law of June 16, 1865, this right was also protected to them. When and where did the impairment begin to exist? In my judgment there never existed such impairment. My colleagues assume that it existed, and upon this assumption go on saying:

"What became of their rights?

"It seems to us there can be but one answer to this question, namely: At the impairment, the debt as it then was became due and payable."

It seems to me that in matter of rights and obligations there can be no other than those strictly derived from the respective stipulations. In the present case the stipulation was a conditional one. Venezuela promised to pay under the condition that the Howlands should previously convert their bills into consolidated debt. The right acquired through a conditional stipulation is eventual or consequential to the accomplishment of the condition; so long as this remains suspended the right resulting therefrom is a mere hope; *tantum spes est debitum iri.* (Justinian Inst.) The condition of consolidating their bills, stipulated for by the Howlands in 1839, was never fulfilled by them or by their representatives in this claim.

Under such circumstances what does justice require at the hands of the Commission?

In my opinion, disallowance of the claim.

The bills upon which this claim is based were exchanged for Colombian bills bought in open market; neither they nor those for which they were exchanged did represent in their face a *real* value; they were convertible into consolidated debt by public auction, and payable by public auction also; all the other holders of this kind of bills converted them at about 33⅓ per cent. of their face value, and afterward redeemed them at about the same rate of their consolidated value. Such bills have never been sold in the market at a higher price than 42 per cent.; this is their actual price. My colleagues have allowed to the claimants the face value of their bonds with five per cent. interest from the date of the supposed impairment of their right of conversion, counting the *peso* at 75 cents gold coin of the United States. This decision seems to me a total departure from justice.

ALPHABETICAL INDEX.

PAGE.

Abbiatti, Albino, *v.* Venezuela 84
Agency 219, 220, 231–235, 245
Aliens, Protection of persons and property of 34, 133–137
Allen, Sarah O. 96
Anderson, Juliet C. 97
Andrade, José, Opinions delivered by, for the Commission, 29, 71, 72, 91, 94
Andrade, José, Commissioner, Dissenting opinions of 230, 339, 457, 491
Aponte, Fabricio 419
Apure, The steamer 457
Aranguren, Dorothy C. 37
Arbitration, International 13, 14, 15
Aspinwall, William H., executor, etc. *v.* Venezuela 297, 491
Assigned Claim 66, 88
Atlantic Insurance Company 120
Awards of former Commission. See "*Decisions of former Commission.*"
Bank currency, Claim for redemption of 85, 86
Barberie, Loretta G. 73
Barnes, James, Heirs of, *v.* Venezuela 86
Barnes, John 351
Barry, Robert 119
Beales & Nobles 247
Beelen, Frederick Anthony 457
Bettiker, Paul, *v.* Venezuela 92
Bogert and Kneeland 140
Bolivar, Juan Vicente 74
Bonds, Claim for value of. See *claims of Gibbs and Aspinwall.*
Bonds of Venezuela, Non-payment of, affords ground for claim 299–318
Bradley, of Flanagan, Bradley, Clark & Company 425
Brion, Loreta 421
Brissot, Amelia de, *v.* Venezuela 457
Brissot, Julius de 458
Cadiz, Ann Eulogia Garcia, *v.* Venezuela 73
Cadiz, José Felix Garcia 74
Cadiz, Joseph 75
Castel, Jose, *v.* Venezuela 408
Causten, James H. 32
Centeno, Dionisio 410
Certificates of award issued by the former Commission, 23, 24, 26, 98, 99, 424

PAGE.

Certificates of award issued by the present Commission, Doubts as to persons entitled to 424
Change of title of claim 410
Choctaw Claim 16, 18
Citizenship 285, 292, 458–461
Citizenship of Claimants, 84, 85, 88, 89, 93, 95, 108–111, 121, 420, 481, 484, 485
Claim, Assigned 66, 88
Claim, Change of title of 410
Claim, Definition of 82, 83, 303–305, 310
Claim, International, Waiver by citizen of right to make 434–452
Claims arising subsequently to August 1, 1868 6
Claims, *ex contractu* 436
Claims, Presentation of 48, 49, 72, 73, 275
Claims, Delay in presenting 67, 68, 93, 131
Claims, Presentation of, to Venezuelan Government 318
Claimants, Must they appear or be personally represented? 25
Claimants, Notice to, of sitting of Commission 26
Clara Rose Sutil, The bark 132
Clark, John, Captain 72
Clark, John, Captain, The representatives of, *et al.*, *v.* Venezuela 284
Clark, Margaret Watson de, *v.* Venezuela 72
Clark, of Flanagan, Bradley, Clark & Company 425
Clarke, Arthur 428
Colombia, Political existence of, began when? 342
Colombian debt 114, 319, 493–497
Commissions, International 14
Commission, present, Character of 339
Commission, Notice to claimants of sitting of 26
Commission of 1868 9–25
Commission, Jurisdiction of—
6, 7, 17–25, 73, 275, 299–318, 327, 420, 435, 436, 438, 444, 450, 451, 485
Contract, non-performance of, Claim for. See *claims of Day; Driggs (No. 14); Walter; Matchett; Abbiatti; Finn; Flanagan, Bradley, Clark & Co.; Woodruff; Hollins & McBlair; Donnell; Williams.*
Contracts, Interpretation of 235–238, 246
Contracts made by so-called *de facto* governments 258–269
Consignee, Foreign, as agent of consignor 219, 220
Convention of 1885, Construction of 11
Copeland, Franklin, and John E. Gowen 381
Cortés, John, *v.* Venezuela 85
Corwin, Amos B., *v.* Venezuela 119
Counsel for claimants 25
Courts of Venezuela, Pursuit of redress in 129, 410, 449, 450
Damages, indirect 453
Davis, Mariana J. de 89
Day, Melville E., *v.* Venezuela 247

PAGE.
Debt, Public.....491, 493–497
Debt, National, of Colombia 114, 141, 319
Debt, National, of Venezuela 114, 320–323, 497–503, 505
Decisions of the Commission..... 9, 24, 25
Decisions of the former Commission.....9–13, 16–25
De facto governments.....256–272
Delay in presenting claims.....67, 68, 93, 131
And see *the claims of Cadiz, Williams, Bettiker, Corwin.*
Decisions of the Supreme Courts of both countries are not binding on the Commission..... 17
Denial of justice.....171, 172, 434, 435
And see *claims of Seth Driggs, Nos.* 10, 31, 32, 40: *and of Wm. S. Miller.*
Denizens, Rights of, as compared with those of citizens 113
Derelict islands. See *the claim of Gowen & Copeland.*
Detention of vessel, Claim for. See *the cases of the Horatio, Nassau, and William Yeaton.*
Dexter, George H..... 406
Dibble, Adell..... 71
Dibble, Daniel..... 71
Dibble, Lucy..... 71
Donnell's, John, Executors *v.* Venezuela..... 205
Driggs, Seth, *v.* Venezuela, Claim No. 7..... 403
Claim No. 10..... 361
Claim No. 11 413
Claim No. 13..... 405
Claim No. 14..... 346
Claim No. 15 275
Claim No. 31..... 91
Claim No. 32..... 390
Claim No. 35, representing the heirs of Benjamin Goodrich..... 71
Claim No. 40..... 410
Claim No. 41, representing the owners of the brig *Good Return*..... 284
Claim No. 43, representing the widow and heirs of Captain John Clark..... 284
Driggs, Seth.....72, 421, 423
Dulaney, Grafton L..... 347
Eleanor, The 205
Eliza Ann, The..... 347
Evidence called for, Failure of Venezuela to produce 382, 456
Evidence, insufficient, Claims based on.....387–389, 444, 450, 453–455
And see *the claims of Driggs (No.* 35), *de Clark, Cadiz, Cortés, heirs of Barnes, Ketchum, Leonardo M. Peck, Loehr, Jove.*
Evidence in support of claims 108

PAGE.
Evidential value of decisions of former Commission.....9, 25
Ex-contractu claims..... 436
Executor entitled to award..... 420
And see *the Willet claim.*
False imprisonment, Claim for. See *Driggs' claim, No.* 10.
Finn, Lorenzo H., *v.* Venezuela..... 94
Findlay, John V. L., Opinions delivered by, for the Commission—
5, 37, 73, 80, 96, 114, 132, 205, 247, 275, 284, 346, 361, 381, 425, 484
Findlay, John V. L., (Commissioner) on Jurisdiction..... 327
Flanagan, Bradley, Clark & Company *v.* Venezuela..... 425
Foreign judgments.....166–171, 339
Forrest, Dulany..... 31
Forrest, Joseph, *v.* Venezuela..... 29
Freights, false, Claim for (see *the claim of Gowen & Copeland*)..... 381
Garcia, General Juan Bautista..... 457
Garcia, Ramon..... 74
Garrison, Cornelius K..... 247
Garrison, David E., *v.* Venezuela..... 247
General questions.....9–27
Gibbs, Robt. W., *v.* Venezuela..... 114
Goodrich, Benjamin..... 71
Goajira peninsula..... 132
Government as a party to a claim..... 67
Gowen, John E., and Franklin Copeland *v.* Venezuela..... 381
Goods sold to Venezuela, Claims for. See *claims of Williams, Finn, Hollins & McBlair, and Donnell's executors.*
Gratitude. Acts calling for national gratitude afford no ground for a money claim. See *the claims of O'Dwyer and E. B. Scott.*
Guano deposits, Claim for (see *the Gowen & Copeland claim*)..... 381
Hammer, John W..... 458
Hammer, Narcisa de, *v.* Venezuela..... 457
Hammond and Newman..... 140
Hearing of cases..... 2
Holders of certificates issued by former Commission..... 26
Hollins and McBlair *v.* Venezuela.....205, 410
Hope Insurance Company..... 120
Horatio, The brig.....37–50
Howland, Gardner G.....297, 491
Howland, Samuel S..... 297
Hurtel, Doctor..... 88
Husband, killing of, Claim for. See *the claims of de Brissot and de Hammer.*
Idler, Jacob, *v.* Venezuela.....139, 339
Imprisonment (false), Claim for. See *Driggs' claim, No.* 10.
Indefinite claims. See *the claims of heirs of James Barnes, John Cortés, Morris Ketchum, Leonardo M. Peck.*
Indirect damages..... 453

PAGE.

Injuries (personal), Claim for. See *the claims of Miller & Stackpole.*
Injury to property, Claim for. See *claims of Castel and Rawdon.*
Insufficient evidence.....387–389, 444, 450–455
Interest on claims.....227–229, 246
Interest, when it begins to run..... 420
Interest, whether simple or compound 118
Interest as an element in the amount of an award..... 194
Interest of claimant in the cause of action..... 130
International arbitration.....13, 14, 15
International Commissions..... 14
Islands, derelict (see *the claim of Gowen & Copeland*)..... 381
Jones, Annie E..... 37
Jove, Lorenzo..... 89
Jove, Ma. Ana P. de, *et al. v.* Venezuela..... 89
Judgments, Foreign.....166–171, 339
Jurisdiction, Findlay's opinion on..... 327
Jurisdiction of the Commission—
6, 7, 17–25, 73, 275, 299–318, 327, 420, 435–438, 444, 450, 451, 485
Justice, Denial of.....171, 172, 434, 435
And see *claims of Seth Driggs, Nos.* 10, 31, 32, 40; *and of Wm. S. Miller.*
Ketchum, Morris, *v.* Venezuela..... 87
Killing of husband, Claim for. See *the claims of de Brissot and de Hammer.*
Kingan..... 88
Kneeland, Bogert and 140
Lewis, Isaac B..... 37
Limitation..... 404
Limitation, Statutes of.....59–67
Little, John, Opinions delivered by, for the Commission, 1, 9, 51, 81, 84, 87, 92, 117, 119, 139, 245, 297, 390, 403, 405, 408, 413, 419, 421, 481
Little, John, Commissioner, Dissenting opinions of.....273, 451
Loans to Venezuela, Claim for (see *Seth Driggs' claim, No.* 11)..... 413
Loehr, Charles H., *v.* Venezuela..... 87
Los Monges Islands.....381, 384–386
McBlair, Hollins and..... 205, 410
Malinsini, Louis..... 421
Marcano.....425
Mariño, General Santiago.....361, 390
Married women, Citizenship of.....108–111
Matchett, William B., *v.* Venezuela..... 5–7
Mechanic, The, the schooner..... 119
Medea, The..... 286
Merger.....437, 440, 442, 445–449
Military supplies, Claim for furnishing. See *the claims of Cadiz and Idler.*

PAGE.

Military services, Claim for. See *the claims of Bettiker, O'Dwyer, and Barnes.*
Miller, Wm. S., *v.* Venezuela 421
Miranda, Ant. M. 119
Modification of rules of the Commission 1–3
Money advanced to Venezuela, Claim for. See *Driggs' claim, No.* 11.
Morril[l], Jonathan T. [C.], *v.* Venezuela 37
Mortgaged property, Liability of purchaser of 447
Nassau, The 406
Neutral property 127
Neutral property in a belligerent's territory, Protection of 408
Neutral's goods, Seizure of 120
Neutrals, Duty of 285–292
Newman, Hammond and 140
Nobles, Beales and 247
Notice to claimants of sitting of Commission 26
Notice to Venezuela of the dereliction of her officials, a necessary condition precedent to any action against her 43
Occupancy, Temporary, of desert islands 385, 386
O'Dwyer, Richard, *v.* Venezuela 80
Orinoco, The, Steam Navigation Company of New York 457
Party to a claim, Government as 67
Parties to a claim 187, 194
Partnership 94, 95
Peck, Leonardo, *v.* Venezuela 419
Peck, Leonardo M., *v.* Venezuela 87
Pension, Claim for non-payment of. See *claims of Margaret W. de Clark and Barnes.*
Personal injuries, Claim for. See *the claims of Miller and Stackpole.*
Perry, Jireh 407
Peso, Value of the 118
Phelps, Thaddeus, & Company 140
Pleadings 448
Plunder of goods by Goajira Indians, Claim for. See *Wipperman's claim.*
Policy, Public, as influencing the interpretation of treaties, 316, 332, 335, 336
Præscriptio 60
Prescription 52–70, 79
Presentation of claims 48, 49, 72, 73, 275
Presentation of claims to Venezuelan Government 318
Principal 219, 220, 231–235
Privateers, seizure of property by, Claim for. See *the claims of Driggs (Nos.* 41 *and* 43), *and Corwin.*
Prize courts 122–125
Proceedings under the Treaty, character of 9–25, 79
Property, Injury to, Claim for. See *claims of Castel and Rawdon.*

PAGE.
Protection of persons and property of aliens.....34, 133–137
Protection by a State of its citizens..... 452
Public debt.....491–497
Public works, Claim for construction of. See *the Walter's claim.*
Purchaser of mortgaged property, Liability of 447
Rawdon, Ralph, *v.* Venezuela..... 457
Rawle, William W..... 32
Redress must be sought through all the appointed channels in a foreign country before the claimant can call upon his own government, 129, 410
Rehearing of adjudications of the former Commission..... 25
Representation of claimants by counsel..... 25
Res adjudicatæ..... 10
Res novæ..... 10
Responsibility of a government for the acts of its officers, 33, 43, 44, 463–475
Responsibility of Venezuela for acts of officials of one of its constituent States.....463, 487–489
Responsibility of Venezuela for acts of revolutionists.....475–479
Restitutio in integrum.....161–164
Reversal of judgments of the former Commission.....13, 14
Review of the decisions of the former Commission.....9–13, 16–25
Rojas..... 425
Rules of the Commission, Modification of..... 1–3
San Pedro, The ship..... 346
San Pedro Company..... 347
Santander, General, The privateer..... 119
Scott, Alexander.....32, 81, 83
Scott, Elizabeth B., *v.* Venezuela..... 81
Seizure of property, Claims for. See *the claims of Gowen & Copeland, Driggs, (Nos.* 7, 15, 35, 41, *and* 43), *Taylor, Forrest, Morrill, Loehr, de Jove, Finn, Castel, Peck (L.), Peck (L. M.), Willet, Corwin.*
Seizure of property for military defence 112, 113
Service on defendant outside of jurisdiction of court..... 164
Services (personal) to Venezuela, Claim for. See *the claims of Bettiker O'Dwyer, Scott, and Ketchum.*
Soto, Buenaventura 94
Soto, Joaquin Hernandez..... 119
Speedwell, The..... 205
Stackpole, Joseph, *v.* Venezuela..... 457
State's liability begins when?..... 129
Stockholders, Liability of 440
Subrogation..... 121
Supreme Courts of both countries, Decisions of, not binding on the Commission..... 17
Sutil, Clara Rose, The bark..... 132
Swan, Benjamin L..... 140
Taylor, Oliver, *v.* Venezuela..... 411

PAGE.
Title of claim, Proposal to change 410
Treaty, Interpretation of 17-25, 302, 306-310, 316
Treaties, How far binding 122, 123
Turpin, E. A. 457
United States, the real claimant 27
Unrepresented claims, 26. See *claims of heirs of James Barnes, Morris Ketchum, Leonardo M. Peck, Seth Driggs* (*Nos.* 31 *and* 35).
Usucapio 60
Vallenilla, Antonio, José 346
Vallenilla, Diego 346
Venezuelan debt 320-323, 497-510
Venezuela, Failure of, to produce evidence called for by the Commission 382, 456
Venezuela, Responsibility of, for acts of officials of one of its constituent States 487-489
Venezuela, Responsibility of, for acts of revolutionists 475-479
Vessel, detention of, Claim for. See *Detention of vessel.*
Walter, Amanda G., executrix *v.* Venezuela 117
Walter, Thomas U. 117
War, Evidence of existence of a state of 481-487
War, losses during time of, Liability for 453
War, Protection of aliens during 34, 35
Willet, Adriano 96
Willet, Clemencia 96
Willet, Clemencia Ramirez 96
Willet, Dolores 96
Willet, Guillermo 96
Willet, Nieves 96
Willet, William E., Estate of, *v.* Venezuela 96
Williams, John H., *v.* Venezuela 51
Wipperman, Frederick, *v.* Venezuela 132
Woodruff, Henry, *v.* Venezuela 425
Yeaton, William. The 29

THE NEW YORK PUBLIC LIBRARY
REFERENCE DEPARTMENT

This book is under no circumstances to be taken from the Building

form 410